

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 644

**THE UNITED GAS IMPROVEMENT COMPANY,
PETITIONER,**

vs.

CONTINENTAL OIL COMPANY, ET AL.

No. 693

FEDERAL POWER COMMISSION, PETITIONER,

vs.

M. H. MARR, ET AL.

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

NO. 644 PETITION FOR CERTIORARI FILED NOVEMBER 2, 1964

NO. 693 PETITION FOR CERTIORARI FILED NOVEMBER 16, 1964

CERTIORARI GRANTED JANUARY 18, 1965

TABLE OF CONTENTS

	Trans. Pages	App. Vol.	App. Pages
Excerpts from Transcript of Hearing held Nov. 20, 1957	108-200	I	2-19
Witness Mills Cox	108-200	I	2-19
Excerpts from Transcript of Hearing held March 10, 1959	1277-1429	I	19-73
Opening Statement by Lawrence M. DeVore	1277-1278	I	19-20
Opening Statement by Edward S. Kirby ..	1282-1283	I	20-21
Opening Statement by Samuel G. Miller ..	1283-1284	I	21-22
Opening Statement by J. David Mann	1285-1286	I	22-23
Witnesses:			
Stewart P. Osborn	1339-1342	I	23-24
E. A. Olsen, Jr.	1343-1347	I	24-26
John C. Jacobs	1348-1391	I	26-49
John T. Guyton	1396-1429	I	49-73
Excerpts from Transcript of Hearing held March 12, 1959	1621-1661	I	74-98
Witness John C. Jacobs	1621-1661	I	74-98
Gas Purchase Contract between Continental Oil Company and Texas Eastern Transmission Corporation (hearing Exhibit No. 3-f)	A2089-A2144	I	99-153
Accounting Exhibit—Texas Eastern Transmis- sion Corp. (Exhibit No. M-10)	A2601-A2603	I	155-157
Letter dated February 3, 1959, Hargrove, Guy- ton and Van Hook to Texas Eastern Trans- mission Corporation (Exhibit No. M-11)	A2604-A2605	I	158-160
Texas Eastern Transmission Corporation, Esti- mated Reserves of Natural Gas in the Rayne Field as of January 1, 1959 (Exhibit No. M-13)	A2608-A2612	I	160-165
Lease Purchase Agreement between Louisiana Gas Corporation and Texas Eastern Trans- mission Corporation (Exhibit No. M-14)	A2613-A2706	I	167-337
Act of Mortgage and Pledge from Louisiana Gas Corp. to M. H. Marr (Exhibit No. M-20)	2771-2776	I	338-348

Table of Contents Continued

	Trans. Pages	App. Vol.	App. Pages
Promissory Note to accompany Mortgage and Pledge from Louisiana Gas Corp. to Continental Oil Company (Exhibit No. M-21)	2777-2780	I	349-353
Application for Certificate of Public Convenience and Necessity by Texas Eastern Transmission Corporation, filed April 22, 1957	2932-2944	I	354-365
Letter, dated November 21, 1957 from Secretary to Texas Eastern granting temporary authority, Docket No. G-12446	3232	I	365-366
Decision of Presiding Examiner in Docket No. G-12446, <i>et al.</i> , filed April 15, 1958	3308-3336	I	367-405
Notice of withdrawal of certificate application, Docket No. G-12913, Sun Oil Company, filed July 9, 1958	3417-3422	I	406-407
Notice of withdrawal of certificate application, Docket No. G-12885, M. H. Marr, filed July 16, 1958	3423-3427	I	408-409
Notice of withdrawal of certificate application, Docket No. G-12931, General Crude Oil Co., filed August 1, 1958	3428-3434	I	409-410
Petition to reopen hearing and to amend applications filed by TE and Texas Eastern Penn-Jersey Transmission Corp. on September 8, 1958	3438-3450	I	411-422
FPC letter to TE, dated December 5, 1958, granting temporary authority in Docket Nos. G-12446 and G-12447	3625-3626	I	422-424
Conditional notice of withdrawal of application in Docket No. G-12432 filed by COC on January 27, 1959	3638-3645	I	425-427
TE's Fourth supplement to petition to reopen in Docket No. G-12446, filed February 4, 1959	3646-3653	I	428-438
Order issued February 19, 1959 reopening proceedings and fixing date of hearing, Docket Nos. G-12446 and G-12447	3668-3670	I	439-443
Order granting motion for omission of intermediate decision procedure and denying motion to expedite time for filing briefs, Docket Nos. G-12446 and G-12447, issued April 6, 1959 ..	3700-3702	I	443-445

Table of Contents Continued

iii

	Trans. Pages	App. Vol.	App. Pages
Opinion No. 322 and order issuing certificate and modifying and adopting initial decision of presiding examiner, issued June 23, 1959...	3708-3724	II	446-467
PSC's application for rehearing of Opinion No. 322, Docket Nos. G-12446, <i>et al.</i> , filed July 23, 1959	3725-3739	II	467-475
Order issued August 21, 1959 denying application for rehearing, Docket Nos. G-12446, <i>et al.</i>	3740-3741	II	476-477
Connoles dissent	3742-3744	II	478-481
Excerpts from Transcript of Hearing held October 23, 1961	1802-1946	II	482-563
Witnesses:			
E. A. Olson, Jr.	1807-1816	II	482-489
Dan L. Marshall	1816-1825	II	489-496
John P. Furman	1827-1852	II	496-515
Gordon L. Jennings	1853-1875	II	515-532
John C. Jacobs	1876-1931	II	532-555
Stewart P. Osborn	1935-1946	II	555-563
Excerpts from Transcript of Hearing held November 29, 1961	2005-2146	II	563-588
Witnesses:			
S. P. Osborn	2005-2026	II	563-576
John P. Furman	2028-2030	II	576-578
John P. Jacobs	2131-2146	II	578-588
Excerpts from Transcript of Hearing held December 5, 1961	2257-2466	II	588-701
Witnesses:			
John P. Jacobs	2257	II	588
E. A. Olson, Jr.	2304-2466	II	589-701
Excerpts from Transcript of Hearing held December 6, 1961	2469-2484	II	701-706
Witness Dan L. Marshall	2469-2484	II	701-706
Excerpts from Transcript of Hearing held December 7, 1961	2506-2597	II	706-720
Witnesses:			
Stewart P. Osborn	2506-2546	II	706-710
E. A. Olson, Jr.	2581-2597	II	710-720

Table of Contents Continued

	Trans. Pages	App. Vol.	App. Pages
Excerpts from Oral Arguments held November 29, 1962	2642-2753	II	720-743
Estimated Reserves and etc. in Rayne Field as of January 1, 1961 (Exhibit X-2)	3746-3750	II	744-748
Proposed Method of Accounting Rayne Field (TE, Exh. X-3)	3751-3752	II	749-750
Rayne Field, Cost of Gas, Years 1961-1989 (TE, Exh. X-4)	3733	II	751
Estimated Residue Gas Production, Rayne Field, 1961-1989 (TE, Exh. X-5)	3754-3767	II	752-764
Exhibit accompanying testimony of John P. Furman (Exh. X-6)	3768-3810	II	765-814
Map (TE, Gas Supply Area, Exh. X-7)	3811	II	815
TE, Schedule of Activity in the Other Deferred Debits Account, 1961-1989 (Exh. X-8)	3812	II	816
Statement of Rayne Field Properties included in Gas Plant in Service and the related Reserves for Depreciation, Depletion and Amortization, December 31, 1960 (Exh. X-9)	3813	II	817
Rayne Field, Balances of Tangible Plant, Natural Gas Producing Leaseholds and Intangible Drilling Costs, Less Applicable Reserves at January 1 each year, for years 1961-1989 (Exh. X-10)	3814	II	818
Rayne Field, Net Liquids Revenues, 1961-1989 (Exh. X-11)	3815	II	819
Schedule of Rayne Field Note Payments (Exh. X-12)	3816	II	820
Schedule of Rayne Field Note Payments, Assuming No Accelerated Installments (Exh. X-13)	3817	II	821
TE, Adjusted Cost of Gas per Exh. X-4, 1961-1989 (Exh. X-14)	3818	II	822
TE, Cost of Service Study, Rayne Field, Case I (Exh. X-15)	3819	II	823

Table of Contents Continued

	Trans. Pages	App. Vol.	App. Pages
TE, Cost of Service Study, Rayne Field, Case 2 (Exh. X-16)	3820	II	824
TE, Rayne Cost of Service Study, Case 3 (Exh. X-17)	3821	II	825
TE, Rayne Cost of Service Study, Case 4 (Exh. X-18)	3822	II	826
Rayne Management Agreement Between COC and Louisiana Gas Corporation	3823-3842	II	827-858
TE, Disposition of Rayne Gas Production, July, 1959-August, 1961 (Exh. X-20)	3843	II	859
TE, History of Well Designations, Rayne (Exh. X-21)	3844	II	861
Opinion and Judgment of D. C. Court of Ap- peals, <i>PSC v. FPC</i> , No. 15,412, decided De- cember 8, 1960 (Received March 6, 1961)	4038-4044	III	862-868
Order Reopening Proceeding, Prescribing Pro- cedures and Fixing Date of Hearing, Issued July 14, 1961, Docket Nos. G-12446, <i>et al.</i> ...	4045-4047	III	869-872
TE's Supplement to Applications, filed Septem- ber 28, 1961 in G-12446 and G-12447	4071-4075	III	873-877
Decision Upon Reopened Proceedings, Issued June 29, 1962, Docket Nos. G-12446, <i>et al.</i> ...	4096-4115	III	877-902
Exceptions of TE to June 29, 1962 Decision; and Motion for Oral Argument filed September 14, 1962, G-12446 and G-12447	4149-4204	III	902-953
Staff Exceptions to June 29, 1962 Decision; filed September 14, 1962	4219-4227	III	954-961
Opinion No. 378, issued February 6, 1963, Docket Nos. G-12446, <i>et al.</i>	4317-4333	III	962
Application for Rehearing and Stay of Opinion No. 378, filed by GCO on March 6, 1963	4334-4340	III	984-986
Application for Rehearing and Stay of Opinion No. 378, filed by Sun on March 6, 1963	4353-4390	III	987-1012
Application for Rehearing filed by COC on March 7, 1963	4391-4488	III	1013-1089

Table of Contents Continued

	Trans. Pages	App. Vol.	App. Pages
Application for Rehearing and Stay of Opinion No. 378, filed by Marr on March 7, 1963	4489-4528	III	1089-1118
Application for Rehearing of Opinion No. 378, filed by TE on March 8, 1963	4529-4549	III	1118-1135
Order issued April 2, 1963 Granting Applications for Rehearing in G-12446, <i>et al.</i>	4555-4557	III	1136-1139
Marr's Application for Rehearing, filed April 15, 1963	4558-4567	III	1140-1144
Sun's Application for Rehearing and Stay, filed April 17, 1963	4568-4579	III	1144-1151
GCO's Application for Rehearing, filed April 22, 1963	4580-4594	III	1151-1158
COC's Application for Rehearing, filed April 30, 1963	4595-4656	III	1159-1214
TE's Application for Rehearing, filed May 1, 1963	4657-4660	III	1215-1217
Order Permitting Intervention, Granting Application for Rehearing and Denying Stay, Issued May 1, 1963	4667-4669	III	1218-1221
FPC Letter Dated May 14, 1963 to Marr Accepting Application for Rehearing as Motion for Reconsideration, etc.	4670-4671	III	1221-1222
Opinion No. 378-A, Issued on July 12, 1963, Docket Nos. G-12446, <i>et al.</i>	4672-4681	III	1223-1233
Sun's Application for Rehearing, filed July 25, 1963	4682-4701	III	1234-1246
Sun's Application for Rehearing, filed July 25, 1963	4682-4701	III	1234-1246
Marr's Application for Rehearing, filed July 29, 1963	4702-4720	III	1247-1258
GCO's Application for Rehearing, filed July 31, 1963	4721-4742	III	1258-1271
FPC Letter Dated August 7, 1963 to Stanley M. Morley Rejecting Marr's Application for Rehearing	4743	III	1271-1272

Table of Contents Continued

vii

	Trans. Pages	App. Vol.	App. Pages
FPC Letter Dated August 7, 1963 to Robert E. May, Rejecting Sun's Application for Rehearing	4744	III	1272-1273
FPC Letter Dated August 8, 1963 to W. M. Streetman Rejecting GCO's Application for Rehearing	4745	III	1273-1274
FPC Letter Dated May 14, 1963 to COC Accepting Application for Rehearing as Motion for Reconsideration	[Not listed]	III	1274-1275
COC Letter Dated August 9, 1963 Transmitting to FPC Application for Rehearing of Opinion 378-A	[Not listed]	III	1275
FPC Letter Dated August 21, 1963 Rejecting COC's Application for Rehearing of Opinion No. 378-A	[Not listed]	III	1276

	Original	Print
Proceedings in the United States Court of Appeals for the Fifth Circuit	1277	1277
Opinion, Rives, J.	1277	1277
Judgment	1293	1289
Order extending time to file petition for writ of certiorari in Case No. 693	1296	1291
Orders allowing certiorari	1297	1292



21

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

**Nos. 20560, 20564, 20582, 20587,
20829, 20846, 20847, and 20591**

**M. H. MARR, SUN OIL COMPANY, CONTINENTAL OIL COMPANY,
GENERAL CRUDE OIL COMPANY, TEXAS EASTERN
TRANSMISSION CORPORATION, *Petitioners,***

v.

FEDERAL POWER COMMISSION, *Respondent.*

**On Petitions to Review Opinions and Orders of the
Federal Power Commission**

JOINT APPENDIX

(Volume III)

(4038)

4038

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Filed Dec 8, 1960)

No. 15,412

Public Service Commission of the State of New York,
Petitioner

v.

Federal Power Commission, Respondent
Texas Eastern Transmission Corporation, Intervenor

On Petition to Review an Order of the
Federal Power Commission

Decided December 8, 1960

Mr. Kent H. Bourn, with whom *Mr. George H. Kenny*
was on the brief, for petitioner.

Mr. David J. Bardin, Attorney, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission at the time the brief was filed, *Howard E. Wahrenbrock*, Solicitor, Federal Power Commission, and *Robert L. Russell*, Assistant General Counsel, Federal Power Commission, were on the brief, for respondent. *Mr. John C. Mason*, General Counsel, Federal Power Commission, also entered an appearance for respondent.

Mr. William D. Deakins, Jr., of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of the

Court, with whom *Mr. Martin L. Friedman* was on the brief, for intervenor.

Before Edgerton, Washington and Bastian, Circuit Judges.

Washington, Circuit Judge: This is a natural gas case. It arises upon petition to review an order of the Federal Power Commission granting to Texas Eastern Transmission Corporation, a pipeline company, an unconditional certificate of public convenience and necessity to expand its pipeline facilities, under Section 7 of the Natural Gas Act.¹

On February 1, 1957, Texas Eastern executed gas purchase contracts with four producer-sellers of natural gas in the Rayne Field area of southern Louisiana. These contracts called for initial prices of 23.9 cents per Mcf, including reimbursement of state taxes in the amount of 1.3 cents. Shortly thereafter, Texas Eastern filed an application for a certificate of public convenience and necessity to construct a connecting line to Rayne Field, and the four producer-sellers filed applications for certification of the sales of gas to Texas Eastern. Hearings were held, and the Examiner entered an order recommending unconditional certification of the proposals.

While the matter was pending before the Commission on exceptions to the Examiner's decision, the Court of Appeals for the Third Circuit reversed an order of the Commission in another case granting unconditional certification of sales of natural gas from the offshore Louisiana fields by independent producers at an initial price of 22.4 cents per Mcf, including tax. *Public Service Commission of New York v. Federal Power Commission*, 257 F.2d 717 (3d Cir. 1958).² Thereafter, as a consequence of

¹ 52 Stat. 824 (1938), as amended, 15 U.S.C. § 717f (1958).

² *Affirmed sub nom. Atlantic Refining Co. v. Public Service Commission*, 380 U.S. 378 (1959), commonly called the "Catco" case.

negotiations between Texas Eastern and the Rayne Field producers-sellers, three of the latter filed notice of the termination of their gas sale contracts and of withdrawal of their certificate applications.³ Texas Eastern thereupon filed a motion to reopen the hearing and amend its original certificate application to modify the design of certain facilities, and to reflect a major change in the plan for acquiring the Rayne Field gas. Instead of purchasing gas in the usual manner from the four producer-sellers, Texas Eastern proposed to acquire leasehold interests in the reserves formerly committed to the contracts, for a total price of some \$134,395,700.00.

The significance of this change in the form of the transaction, at least from the standpoint of the producer-sellers, is manifest. Sales of natural gas by an independent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). The Commission urges that because the acquisitions, in their revised form, are "non-jurisdictional," it is under no obligation to determine whether the price to be paid by Texas Eastern for the gas is consonant with the public interest as a prerequisite to certification of the pipeline construction project which relies upon these leases. A like position is taken by Texas Eastern, which has intervened.

It was entirely within the Commission's power to certify the pipeline construction program without passing upon

³ The fourth producer-seller did not file its notice of withdrawal until sometime later.

the financial merits of the gas acquisition arrangement.⁴ But the language and the tenor of the Commis-

4041

sion's Opinion and Order appear to confer general approval upon the terms of the acquisition arrangement. Insofar as the Order purports to pass favorably upon the pricing aspects of the gas lease acquisitions, it is unsupported by substantial evidence in the record, and cannot stand.

While the Act does not require a determination that proposed rates will be just and reasonable in a Section 7 certification proceeding, the fact that prices of natural gas "have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance." *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 391 (1959) ("Catco"). We read that decision as holding that where a natural gas company seeks an unconditional certificate to make new sales of natural gas at proposed prices which are "out of line" with existing prices, or which will tend to have an inflationary impact on the natural gas market, it is under an obligation to demonstrate upon the record the reasons why such increased prices are justified by the "public convenience and necessity." The Commission may not act merely upon proof that the prices in question were arrived at as a result of arm's-length negotiation, but must look behind the negotiated price. Nor can it abdicate its responsibilities simply because the parties settle it that the whole transaction will collapse unless the full price asked is approved.

Under the proposed "lease purchase" arrangement, petitioner claims that the total cost to Texas Eastern for each Mcf of Rayne Field gas will be 22.89 cents, including Lou-

⁴ This procedure was followed in *Kansas Pipe Line and Gas Co., et al., Doc. G-106, et al.*, 2 F.P.C. 29, 45 (1939).

isiana tax of 2.3 cents. The Commission questions some aspects of the petitioner's calculations. The difficulty of comparing an ordinary gas purchase with what is here proposed is manifest. But in any event we think it clear that the price is high enough to be in the disputed area to which the *Catco* rule applies. While it is true that in subsequent rate proceedings instituted

4042

under Section 5 the Commission might properly inquire behind the negotiated acquisition costs, *City of Detroit v. Federal Power Commission*, 97 U.S.App.D.C. 260, 230 F.2d 810 (1955), cert. denied, 352 U.S. 829 (1956), the "nigh interminable" delay associated with such proceedings makes it essential that any proposal under Section 7 be subjected to a most careful scrutiny *Atlantic Refining Co. v. Public Service Commission*, *supra*. As the Supreme Court has declared in another context, "[u]nreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 693 (1947).

It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, beyond the regulatory control of the Commission. The pipeline construction project and the transactions by which Texas Eastern will dispose of the gas thus acquired clearly are within the Commission's jurisdiction. The relevance of Texas Eastern's acquisition costs to these matters is unaffected by the form of the transaction; the Commission's warrant to inquire arises by virtue of its responsibility to regulate the purchaser, regardless of the status of the seller.

(4043)

Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant. See *Kansas Pipe Line and Gas Co., et al.*, *supra* note 4. Or it may reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity.

4043

The Commission's Order of June 23, 1959, is reversed, and the matter remanded to the Commission for further proceedings not inconsistent with the opinion of this court.

So ordered.

A true Copy, Test:

(SEAL)

/s/ JOSEPH W. STEWART

Clerk of the United States Court of Appeals for the
District of Columbia Circuit

(4044)

4044

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,412

(Filed Dec 8, 1960)

Public Service Commission of the State of New York,
Petitioner,

v.

Federal Power Commission, Respondent,
Texas Eastern Transmission Corporation, Intervenor.

On Petition to Review an Order of the
Federal Power Commission.

Before: Edgerton, Washington and Bastian, Circuit
Judges.

Judgment

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of June 23, 1959, of the Federal Power Commission on review in this case is reversed, and that this case is hereby remanded to the Federal Power Commission for further proceedings not inconsistent with the opinion of this court.

Per Circuit Judge Washington.

Dated: Dec 8, 1960

A True Copy, Test:

(SEAL)

/s/ JOSEPH W. STEWART

Clerk of the United States Court of Appeals for the
District of Columbia Circuit

4045

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline, Joseph C. Swidler and Howard Morgan.

Docket Nos. G-12446 and G-12447

Texas Eastern Transmission Corporation

Docket No. G-12432

Continental Oil Company

**Order Reopening Proceedings, Prescribing
Procedures and Fixing Date of Hearing**

(Issued July 14, 1961)

By our order of June 23, 1959, we issued a certificate of public convenience and necessity authorizing Texas Eastern Transmission Corporation (Texas Eastern) to construct and operate certain facilities including a compressor station at Rayne Field, Acadia Parish, Louisiana and some 22 miles of pipeline connecting Rayne Field to Texas Eastern's Beaumont-Kosciusko line.¹ The United States Court of Appeals for the District of Columbia Circuit in setting aside our aforesaid order and remanding this matter to us for further proceedings not inconsistent with the opinion of this Court, has suggested the following permissible courses:

Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant. See Kansas

¹ 21 FPC 860

(4045)

Pipe Line and Gas Co., *et al.*, supra note 4. * Or it may reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity.²

In our judgment the first course enunciated by the Court would too long leave unsettled matters of public importance and would provide inadequate protection to the public. Accordingly, we shall reopen the record in this proceeding to afford Texas Eastern an opportunity to make that showing contemplated by the Court's aforementioned latter course.

It is also necessary and reasonable that we define, but not necessarily limit, the issues and prescribe procedures, as hereinafter ordered, so as to guide the course of this reopened proceeding:

4046

The Commission orders:

(A) The consolidated proceeding designated as Docket Nos. G-12446, G-12447 and G-12432 is hereby reopened for the purpose of determining:

(1) Whether the public convenience and necessity require that the certificate issued in these proceedings by our order of June 23, 1959, and set aside by the Court of Appeals, be reissued in whole or in part;

(2) Whether the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is out of line;

(3) Whether Texas Eastern's proposal is in the public interest even if the cost of the gas to Texas

² *Public Service Commission of New York v. F.P.C.*, 287 F.2d 143, 146.

Eastern and its customers proves to be out of line; and

(4) If Texas Eastern's lease acquisition is not in the public interest by reason of the cost of the Rayne Field gas, whether Texas Eastern should be ordered to cease and desist from operating the "Rayne Field facilities" or as a possible alternative, whether Texas Eastern will agree that in future determinations of the justness and reasonableness of its rates under Sections 4 and 5 of the Natural Gas Act it will not claim actual costs associated with Rayne Field gas if the reasonable area price is lower than actual cost.

(B) In order to better resolve the aforesaid issues and that the hearing as hereinafter ordered may proceed in an expeditious manner, it is further ordered that on or before August 30, 1961, Texas Eastern file with the Commission and serve on all the parties a supplement to its applications herein to contain at a minimum:

(1) An up-to-date reserve and deliverability study for the Rayne Field to include actual production to date;

(2) Annual production plans for Rayne Field extending through to the estimated life of the field;

(3) An exhibit showing the proposed method of accounting by Texas Eastern for the Rayne Field transaction and all costs incident thereto; and

4047

(4) Study or studies showing the cost of making natural gas from Rayne Field available to the Texas Eastern system, including every cost associated, either incurred and/or anticipated, in the acquisition, further development, production, operation and main-

(4047)

tenance of Rayne Field which Texas Eastern claims should be considered in future determinations of the justness and reasonableness of Texas Eastern's rates. Such studies should reflect the anticipated annual changes in the cost of the Rayne Field gas through to the estimated year of abandonment.

(C) Pursuant to the authority conferred on the Federal Power Commission by the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held on October 23, 1961 at 10:00 a.m. (EDST) in a Hearing Room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C., respecting the matters stated in paragraph (A) above. Parties previously permitted to intervene in this proceeding are deemed to be interveners in the instant ordered reopened proceeding. Additional protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D.C., in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 or 1.10) on or before August 10, 1961.

By the Commission.

JOSEPH H. GUTRIDE
Secretary.

4071

(Docketed Sept. 28, 1961)

**UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION****Docket Nos. G-12446 and G-12447****In the Matter of****TEXAS EASTERN TRANSMISSION CORPORATION****Supplement to Applications in Accordance With
Commission Order of July 14, 1961**

Now Comes Texas Eastern Transmission Corporation (Texas Eastern) and files this Supplement to its Applications in the above dockets in response to the Commission's Order Reopening Proceeding, Prescribing Procedures and Fixing Date of Hearing issued herein on July 14, 1961. This Supplement is being filed by Texas Eastern for the sole purpose of complying with the aforesaid order of the Commission and such filing is made without prejudice to or waiver of Texas Eastern's right to contend that any or all of the information and data furnished hereby is beyond the scope of and irrelevant and immaterial to any issues which may be raised or tried under the order of the United States Court of Appeals for the District of Columbia Circuit remanding this proceeding to the Commission.

1.

In response to Subparagraph (1) of Paragraph (B) of the Commission's order, Texas Eastern attaches hereto as Exhibit X-2 an Estimated Reserves and Availability Study for the Rayne Field as of January 1, 1961, including estimated cumulative production to January 1, 1961. Actual production from January 1, 1961, to September 1, 1961, amounted to 30,060 MMCF of gas at 14.73 psia.

2.

In response to Subparagraph (2) of Paragraph (B) of the Commission's order, Texas Eastern states that it does not have any fixed "annual production plans for Rayne Field extending through to the estimated life of the field." One example of an annual production program is evidenced by the Availability Study included in Exhibit X-2 attached hereto. However, as the Commission observed in its Opinion No. 322, issued herein on June 23, 1959, by acquiring the Rayne Field lease: "... Texas Eastern will acquire control over the rate of production; and the minimum take or pay for provisions of the gas purchase contracts will be eliminated, thereby increasing the flexibility of the company's overall pipeline operations" (Slip Opinion Page 9). Texas Eastern plans to utilize the Rayne Field as a balance wheel in such manner as to provide the greatest possible economy and efficiency under changing day to day operating conditions. In the past, Texas Eastern's Rayne Field production has ranged from absolute minimum days when the field has been completely shut in to a maximum daily production of 181,679 MCF at 14.73 psia. In the future, Texas Eastern expects to continue to regulate its takes from the Rayne Field to meet the seasonal and cyclical needs of its system in such manner as will afford the most efficient operation of its pipeline system.

3.

In response to Subparagraph (3) of Paragraph (B) of the Commission's order, Texas Eastern attaches hereto as Exhibit X-3 a proposed method of accounting by Texas Eastern for the Rayne Field transaction and all costs incident thereto.

4073

4.

In response to Subparagraph (4) of Paragraph (B) of the Commission's order, Texas Eastern is attaching hereto as Exhibit X-4 an estimate of the cost of making natural gas from the Rayne Field available to the Texas Eastern system if gas should be produced in accordance with the Availability Study included in Exhibit X-2 attached hereto. Texas Eastern is unable to state definitely that all of the costs shown on Exhibit X-4 will actually be incurred or that such costs represent "every cost" which will be incurred in the further development, production, operation and maintenance of Rayne Field. Texas Eastern claims that the reasonable costs which it may incur as a prudent operator of the Rayne Field in conjunction with its pipeline system should be considered in future determinations of the justness and reasonableness of Texas Eastern's rates. The exact amount and nature of such costs will necessarily depend upon future operating circumstances which cannot be precisely predicated at this time. In addition, Texas Eastern claims it will be entitled to earn a reasonable rate of return on its investment in the Rayne Field in accordance with such principles as may be established in its future rate cases.

Wherefore, Texas Eastern supplements its applications in accordance with the Commission's order of July 14, 1961.

Respectfully submitted,

TEXAS EASTERN TRANSMISSION CORPORATION

By Walter E. Caine, Vice President

(4074)

4074

Attorneys for Applicant:

Jack D. Head, Vice President and General Counsel
Texas Eastern Transmission Corporation
P.O. Box 1189
Houston, Texas

W. D. Deakins
Vinson, Elkins, Weems & Searls
New First City National Bank
21st Floor
Houston, Texas

Keith M. Pyburn
Texas Eastern Transmission Corporation
425 - 13th Street, N.W.
Washington 4, D. C.

Joseph F. Weiler
Texas Eastern Transmission Corporation
P. O. Box 1189
Houston, Texas

4075

VERIFICATION

STATE OF TEXAS
COUNTY OF HARRIS

WALTER E. CAINE, being first duly sworn, states that he is Vice President of Texas Eastern Transmission Corporation; that he is authorized to execute this affidavit; that he has read the above and foregoing Supplement and is familiar with the contents thereof; and that all allegations and facts contained therein are true and correct to the best of his knowledge, information and belief.

/s/ WALTER E. CAINE
Walter E. Caine

(4096)

Sworn to and Subscribed before me this 27th day of
September, 1961.

/s/ SYLVIA BUTLER
Sylvia Butler
Notary Public
County of Harris, Texas
My Commission expires
June 1, 1963.

(SEAL)

4096

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Decision

Docket No. G-12446

Texas Eastern Transmission Corporation

Docket No. G-12447

Texas Eastern Transmission Corporation

Docket No. G-12432

Continental Oil Company

UPON REOPENED PROCEEDINGS UPON REMAND
UNDER SECTION 7, NATURAL GAS ACT

(Issued June 29, 1962)

APPEARANCES

For the Brooklyn Union Gas Company

Edwin F. Russell

Harry G. Hill, Jr.

Brooklyn, New York

For New York Public Service Commission

Barbara M. Suchow

New York, New York

Kent H. Brown

Charles J. Cox

Albany, New York

(4096)

For New Jersey Natural Gas Co.

Sidney M. Schreiber

Newark, New Jersey

For the United Gas Improvement Co.

J. David Mann, Jr.

John E. Holtzinger, Jr.

J. Frederick Moring

Washington, D. C.

4097

For Long Island Lighting Co.

David K. Kadane

E. M. Barrett

Bernard Hulkower

Mineola, New York

For Pennsylvania Public Utility Commission

Alan R. Squires

Hubert E. Squires

Harrisburg, Pennsylvania

*For the Ohio Fuel Gas Company and the
Manufacturers Light and Heat Company*

Frederick H. Clark

Brooks E. Smith

William C. Hart

R. A. Rosan

New York, New York

For Public Service Electric and Gas Company

J. Harry Mulhern

Edward S. Kirby

Fred M. Broadfoot

James R. Lacey

Newark, New Jersey

William R. Duff

Washington, D. C.

For the Staff of the Federal Power Commission

George P. Lewnes

Washington, D. C.

FRAZEE, PRESIDING EXAMINER: This is a certificate proceeding under Section 7 of the Natural Gas Act.

4098

This historical background of this controversy shows that the Texas Eastern Transmission Corporation (Texas Eastern), a Delaware corporation with its principal place of business in Shreveport, Louisiana, is a natural-gas company owning and operating an interstate natural gas transmission system extending from Texas to the Philadelphia-Newark area.

On February 1, 1957, Texas Eastern executed gas purchase contracts with the Continental Oil Company (Continental), M. H. Marr (Marr), Sun Oil Company (Sun) and General Crude Oil Company (General Crude) to purchase their natural gas production in the Rayne Field, Acadia Parish, Louisiana at an initial price of 23.9¢ per Mcf including state taxes of 1.3¢ per Mcf.

On April 22, 1957, Texas Eastern filed an application¹ with the Federal Power Commission seeking a certificate of public convenience and necessity authorizing it to construct and operate a 2200 horsepower compressor station and 22 miles of 14-inch pipeline for the purpose of transporting natural gas from Rayne Field to Opelousas, Louisiana, where the gas will be connected to its Beaumont-Kosciusko interstate pipeline system.

Applications for certificates of public convenience and necessity for the sale of natural gas from Rayne Field to Texas Eastern under the aforesaid gas purchase contracts, were filed by Continental² on April 17, 1957, Marr³ on

¹ Docket No. G-12446.

² Docket No. G-12432.

³ Docket No. G-12885.

(4098)

July 15, 1957, Sun⁴ on July 17, 1957 and by General Crude⁵ on July 22, 1957.

These applications were consolidated and a hearing was held thereon. An initial decision⁶ was filed by the Presiding Examiner

4099

on April 15, 1958, authorizing the proposals and issuing unconditioned certificates of public convenience and necessity under Section 7 of the Natural Gas Act. Exceptions to the initial decision were filed with the Commission.

Before the Commission acted on the exceptions the Court of Appeals, 3rd Circuit, in the *Public Service Commission of New York v. F.P.C.*, (CATCO) 257 F. 2d 717⁷ reversed an order of the Commission granting unconditioned certificates of public convenience and necessity for the sale of natural gas from off-shore Louisiana by independent producers at 22.4¢ per Mcf, including tax.

Following the 3rd Circuit decision the producers herein, Continental, Marr, Sun and General Crude, each filed notices of the termination of their sales contracts with Texas Eastern and requested withdrawal of their applications for certificates of public convenience and necessity, which requests were granted by the Commission.

Texas Eastern thereupon filed a petition to reopen the hearing and to amend its application for a certificate of public convenience and necessity to reflect a change in its plan for acquiring the Rayne Field gas. Under the new plan Texas Eastern proposed to acquire the leasehold interests in the reserves formerly committed to the contracts by Continental, Marr, Sun and General Crude.

⁴ Docket No. G-12913.

⁵ Docket No. G-12931.

⁶ 21 F.P.C. 869.

⁷ Affirmed sub. nom. *Atlantic Refining Co. v. Public Service Commission*, 360 U. S. 738 (1959), commonly referred to as the "CATCO" case.

The petition to reopen was granted, and at the conclusion of the hearing a motion to waive the initial decision was made, which was granted by the Commission.

On June 23, 1959, by its Opinion No. 322, *Texas Eastern Transmission Corporation*, 21 F.P.C. 860, the Commission granted an unconditioned certificate of public convenience and necessity for the compressor station and 22 miles of 14-inch line to connect the Rayne Field gas to the Texas Eastern interstate pipeline at Opelousas. In this opinion the Commission said, at page 861, "The Rayne Field is one of the few large and fully developed gas reserves *not presently committed to and serving a market*" (emphasis supplied). In its Third Supplement to the aforesaid petition to reopen the hearing filed December 15, 1958,

4100

"Texas Eastern advised the Commission that it had acquired the right to purchase the entire working interest of Continental, Marr, Sun and General Crude in the Rayne Field leases, under the terms and conditions of the final Lease Purchase Agreement dated December 4, 1958, which it filed with the Commission," *Cf.* 21 F.P.C. 860, 862. Texas Eastern would thereby acquire "the oil and gas leases and related properties . . . insofar as they apply to the proved reserves" p. 863. The Commission made no inquiry into the cost to Texas Eastern of acquiring the Rayne Field leases and related properties but the Commission did state, at page 864:

"In our judgment, the record in this case amply supports the conclusion that the elements of public convenience and necessity are satisfied by Texas Eastern's modified project, without examining into the cost to Texas Eastern of the Rayne Field leases to the extent advocated . . . Texas Eastern has not filed an application for a certificate authorizing the acquisition of the

Rayne Field leases and we have no authority to issue such a certificate. However, we have considered all the circumstances pertaining to the company's acquisition of the Rayne Field leases and the effects of the public proposed to be served, including the extent and accessibility of this gas supply; the benefits thereof in enabling Texas Eastern to meet consumer demands; the terms and conditions of the lease sale and purchase agreements including the price to Texas Eastern of the gas thereunder; the claimed savings accruing to Texas Eastern from acquiring the leases rather than purchasing the gas under gas purchase contracts; and the other factors present here. And we conclude that the company's modified project, as it would include and rely on the acquisition of the Rayne Field leases, is required by the public convenience and necessity and otherwise meets the requirements of Section 7(e) of the Act."

The Commission went on to say that Texas Eastern, through Louisiana Gas,⁸ would pay Continental *et al.* the sum of \$12,420,500 in cash upon the issuance by the Commission of a satisfactory certificate of

4101

public convenience and necessity to Texas Eastern and Texas Eastern will simultaneously make 16 serial promissory notes to each of the sellers payable over a 16-year period in the total amount of \$121,975,200 as the balance of the purchase price of the leases. The notes were to be secured by a mortgage and without interest. The sellers retained a production payment out of the liquids produced with the gas, they also reserve the leasehold rights to all crude oil production and gas which may be produced from

⁸ The Louisiana Gas Corporation is a Delaware corporation formed by Texas Eastern for the purpose of acquiring the Rayne Field leases through it.

below the Nodosaria A Sand. The leases to be conveyed to Texas Eastern were alleged to cover an estimated reserve of 988,771,000 Mcf of natural gas.

The Public Service Commission of the State of New York filed a motion for a rehearing in Opinion 322 in order to "determine upon what price for the acquisition of the Rayne Field leaseholds, public convenience and necessity would require authorization of the related construction herein proposed by Texas Eastern," contending that this is "the Commission's only opportunity to require producer disclosure of the costs associated with this gas and their relation to the sale price" of these leases. 21 F.P.C. 860, 864. The motion was denied and the Public Service Commission of the State of New York filed its petition in the Court of Appeals, D. C. Circuit, for a review of the Federal Power Commission's Opinion No. 322.

The Court of Appeals, D. C. Circuit, on December 8, 1960, in *Public Service Commission of the State of New York v. F.P.C.*, 143 F. 2d 143, held the acquisition of the leasehold interest in gas reserves was beyond the jurisdiction of the Commission, nevertheless the pipeline construction project and the transactions by which Texas Eastern will dispose of the gas thus acquired clearly are within the jurisdiction of the Commission, and the Commission was required, under the CATCO⁹ decision, to inquire into Texas Eastern's acquisition costs based upon the Commission's responsibility to regulate the purchaser (Texas Eastern), regardless of the status of the seller. The order of the Commission in its Opinion 322 was reversed and remanded, the Court stating:

"Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant. See *Kansas Pipe Line*

⁹ See footnote 7, *supra*.

and Gas Co. et al., supra note 4. Or it may reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposed to incur will be consistent with the public convenience and necessity."

4102

On July 14, 1961, the Commission issued its "Order Reopening Proceeding, Prescribing Procedures and Fixing Date of Hearing," 26 F.P.C. 167. Texas Eastern was afforded the opportunity to "establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity."¹⁰ The order also defined, but did not limit, the issues as a guide to the course of the reopened proceeding which was to be convened on October 23, 1961. Parties previously permitted to intervene were permitted to intervene in the reopened proceeding.

Hearings were held at which only Texas Eastern offered evidence. At the conclusion of the hearing on December 7, 1961, those desiring to do so were permitted to file briefs, were filed by Texas Eastern, the Staff, the Public Service Commission of New York, the Public Service Electric and Gas Company, the Long Island Lighting Company, the United Gas Improvement Company and the Philadelphia Electric Company, the latter two filed a joint brief.

The Public Service Commission of New York, in its petition to review the Commission's order in Opinion 322, complained only of the Commission's finding as to the cost of the Rayne Field acquisition, and the Court of Appeals, D. C. Circuit, in its decision made no reference to the feasibility of the proposed construction, nor the market for the Rayne Field gas. These aspects of a certificate application under Section 7 of the Act were not among the issues defined by

¹⁰ This being the second of the "two courses . . . open to the Commission." *Public Service Commission of New York v. F.P.C.*, 287 F. 2d 143, 146.

the Commission to be heard in this reopened proceeding. They are herein considered to have been affirmatively determined by the Commission in its Opinion 322, 21 F.P.C. 860.

Before considering the merits of the Texas Eastern proposal the question of the jurisdiction of the Commission, under the Natural Gas Act, over the acquisition of these Rayne Field leases warrants consideration because the Staff, and at least one of the intervenors, vigorously contend in their briefs the Commission does have jurisdiction over such acquisitions.

4103

Section 1(b) of the Natural Gas Act states, in part,

"The provisions of this Act shall apply to the *transportation* of natural gas in *interstate commerce*, to the *sale* in *interstate commerce* of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to *natural gas companies engaged in such transportation or sale . . .*"

(Emphasis Supplied)

This record discloses the Rayne Field leases were acquired by Texas Eastern without the approval of the Commission. This record, as was the first record (21 F.P.C. 860, 861), is clear that the natural gas under the Rayne Field leases acquired by Texas Eastern, *was not*, at the time of the acquisition, connected with any pipeline transporting natural gas in interstate commerce and, further, the natural gas under the Rayne Field leases acquired by Texas Eastern had not, at the time of the acquisition, been dedicated to any sale in interstate commerce. As far back as 1949, the Commission contended it had jurisdiction over the sale by Panhandle of certain leases and leasehold interests covering an estimated 12 per cent of the total gas reserves of Panhandle but the Supreme Court in *F.P.C. v.*

(4103)

Panhandle Eastern Pipe Line Company et al., 337 U. S. 498, recognized and upheld the traditional industry practice of a natural gas company to buy and/or sell leases and leasehold interests which are "not connected with any pipeline system" (emphasis supplied) without the approval of the Commission. From this, it would appear, one of the prerequisites to Commission jurisdiction is that the natural gas under the leases or leasehold interests must first be connected to a pipeline system transporting natural gas in interstate commerce. The Commission argued before the D. C. Circuit, in the following case, it did not have jurisdiction over Texas Eastern's acquisition of the Rayne Field leases and leasehold interests and, in its opinion, the Court of Appeals, D.C. Circuit, in *Public Service Commission of the State of New York v. F.P.C.*, 287 F. 2d, 143, 145 said "... the Commission has been held to lack jurisdiction over gas leases" citing *F.P.C. v. Panhandle, supra*. It is contended in the briefs filed herein the Supreme Court reversed its decision in the *Panhandle* case, *supra*, by its decision in *Phillips Petroleum Co. v. Wisconsin et al.*, 1954, 347 U. S. 672. Quite to the contrary. In *Phillips* the Supreme Court recognized and reaffirmed the *Panhandle* prerequisite of the gas being attached to an interstate system of pipelines before the Commission acquired jurisdiction. In *Phillips* the Supreme Court was meticulous in saying, at page 675,

4104

"The gas flows from the producing wells, in most instances at well pressure, through a network of converging pipelines of progressively larger size to one of twelve processing plants, where extracable products and impurities are removed. . . . After processing is completed, the gas flows from the processing plant through an outlet pipe, of varying lengths up to a few hundred feet, to a delivery point where the gas

is sold and delivered to an interstate pipeline company. The gas then continues its flow through the interstate pipeline system until delivered in other states."

From this quotation it is obvious the natural gas under consideration by the Supreme Court in its *Phillips* opinion, *supra*, had *previously* been attached to, or *connected with*, an interstate system of pipelines and, because of this connection, the gas flowed in interstate commerce and thereby become subject to the jurisdiction of the Commission.

In applying the principles of the *Panhandle* and *Phillips* opinions, *supra*, to the evidence of record in this hearing, it is concluded the Commission was without jurisdiction over the Rayne Field lease and leasehold acquisition and the natural gas under said leases and leaseholds by Texas Eastern until (1) the gas was connected to an interstate system of pipelines or (2) the gas was dedicated to a sale in interstate commerce.¹¹ This is not to say, however, that the Commission is without jurisdiction to regulate the purchaser of the natural gas, in this case Texas Eastern, and to determine at what price the public convenience and necessity requires the dedication of the Rayne Field gas

¹¹In arriving at this conclusion the Examiner is fully cognizant of an initial decision filed January 8, 1962, in *Tennessee Gas Transmission Company et al.*, Docket No. G-14562. et al. Subsequent to the filing of this decision, and before the Commission had acted upon the exceptions filed thereto, amended applications were filed by all parties which materially changed the manner in which the natural gas would be acquired from the producers. These amended filings were accepted by the Commission and upon motions duly filed the proceedings were reopened and remanded for further hearing upon the amended applications. Thus the matters disposed of by the Examiner in his initial decision are no longer before the Commission. See Commission order issued March 26, 1962, in *Tennessee Gas Transmission Company et al.*, Docket No. G-14562.

by Texas Eastern to a sale in interstate commerce for resale to consumers of natural gas in other states. The Courts have been unequivocal in requiring the Commission to give careful consideration to the price paid for natural gas by an interstate system to the end that natural gas may be delivered to the consumer at the lowest reasonable cost, or price.

Following the issuance of the unconditioned certificate of public convenience and necessity by the Commission on June 23, 1959, by its Opinion 322, *supra*, Texas Eastern moved promptly and acquired the Rayne Field leases and leasehold interests on July 27, 1959.¹² In its ordering paragraph (D) the Commission gave Texas Eastern six months' time from the date of the issuance of Opinion 322 within which to construct the facilities proposed and authorized and to place such facilities in operation. Texas Eastern on March 29, 1960, filed its affidavit stating the facilities had been constructed and itemized the costs thereof. Between the date the facilities were placed in operation and January 1, 1961, Texas Eastern took approximately 65,000 MMCF of natural gas into its interstate system from the Rayne Field for resale in interstate commerce.

Because the Commission did not have jurisdiction over the acquisition of these Rayne Field leases and the natural gas thereunder presents no legal barrier to the Commission's jurisdiction over the purchaser of the gas. This jurisdiction attaches upon the acceptance by Texas East-

¹² Also, on this same date Texas Eastern entered into a management agreement, through the Louisiana Gas Company with Continental Oil Company, one of the sellers and the principal developer of Rayne Field, under which Continental would manage, control, further explore, develop, maintain, produce and deliver the Rayne Field leases and gas for the use and benefit of Texas Eastern, all as shown by Exhibit X-19 herein.

ern of a certificate of public convenience and necessity issued by the Commission upon the application of Texas Eastern for authorization to connect, by the construction and operation of the facilities herein proposed, the Rayne Field gas reserves to its interstate system, which, by its market showing in the previous hearings herein dedicated this particular Rayne Field gas to out-of-state markets for resale for ultimate public consumption. The Act, as above shown, confers jurisdiction upon the Commission over "the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use." And, as was said in *Atlantic Refining Co. et al. v. Public Service Commission of New York*

4106

et al., (CATCO) 1959, 360 U.S. 378, 389, "Section 7(e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use." The Supreme Court, went on to say "... once so dedicated" by the acceptance of a certificate of public convenience and necessity "there can be no withdrawal of that supply from continued interstate movement without Commission approval." From the words of the statute—the Natural Gas Act—and the decision of the Supreme Court in the CATCO case, *supra*, there can be no doubt as to the jurisdiction of the Commission over the conditions under which Texas Eastern may transport and sell the Rayne Field gas in interstate commerce.

The conditions under which Texas Eastern may transport and sell the Rayne Field gas remain for consideration. By its order reopening these proceedings the Commission directed Texas Eastern to file (1) an up-to-date reserve and deliverability study for the Rayne Field to include actual production to date, (2) annual production plans for

Rayne Field extending through to the estimated life of the field, (3) an exhibit to show the proposed method of accounting by Texas Eastern for the Rayne Field transaction and all costs incident thereto, and (4) studies showing the cost of making natural gas from Rayne Field available to the Texas Eastern system, including every cost associated, either incurred and/or anticipated, in the acquisition, further development, production, operation and maintenance of Rayne Field which Texas Eastern claims should be considered in future determinations of the justness and reasonableness of Texas Eastern's rates. Thus the first issue to be considered is the Mcf cost of the Rayne Field gas to Texas Eastern, or, in lieu thereof, the initial price at which it may take, as required by the public convenience and necessity, the Rayne Field gas into its interstate transmission system for transportation and resale in interstate commerce for ultimate public consumption. The Commission in its Opinion 322, 21 F.P.C. 860, 867 found, based upon the evidence then before it, the "average cost of producing the Rayne Field gas would be 20.59¢ per Mcf," exclusive of severance taxes.

The evidence by Texas Eastern would show a residue¹³ gas reserve in the Rayne Field on January 1, 1961 of 924,678,000 Mcf at 14.73 psia

4107

and 60° F.¹⁴ (Ex. X-2, Sch. 1, Col. M, ln. 27), together with an estimated availability commencing January 1, 1961,

¹³ The term "residue gas," as here used, refers to that gas which is available for sale after having taken into account the combination of losses due to condensation in the reservoir, the extraction of separator or condensate and plant liquids (tr. 1815).

¹⁴ In Ex. X-2, Sh. 1, Col. m, ln. 16, it was estimated there was initial gas in place of 1,183,517,000 Mcf and, on ln. 17, terminal gas in place of 89,479,000 Mcf of which, the witness Olson, a vice president of DeGolyer and MacNaughton, testified 93 per cent would be recovered from Rayne Field by Texas Eastern. (tr. 2331)

through the year 1989 of 29,586,356 barrels of condensate and 21,812,852 barrels of plant liquids¹⁵ (Ex. X-2, Sh. 2, Cols. (d) and (e), ln. 30). The witness who sponsored this reserve study had previously testified in the first hearing sponsoring Exhibit M-13, an estimate of the natural gas reserves in the Rayne Field as of January 1, 1959, showing then an estimated reserve, as of that date, of 988,771,000 Mcf (tr. 1813). His testimony now is that four additional wells were drilled in the Rayne Field between January 1, 1959 and January 1, 1961 which resulted in proving up additional reservoirs but had little effect upon the total field reserves. Regarding the difference between his January 1, 1959 estimated reserve of 988,771,000 Mcf and his January 1, 1961 estimated reserve of 924,678,000 Mcf he says is accounted for by the interim production of 65,396,000 Mcf (tr. 1813) (988,771,000 - 65,396,000 = 923,375,000 Mcf). Another witness, sponsoring the same exhibit, stated two additional dual completion wells would be required to be drilled in 1962, one dual completion well in 1971 and an additional dual completion well in 1972 in order to complete the development of Rayne Field. During the life of the field certain of the existing wells would have to be recompleted to deeper producing sands to increase the deliverability from that sand. The estimated cost for the drilling of the four dual completion wells was shown to be \$2,000,000 (Ex. X-5, p. 2), these costs, in addition to well workover and recompletion costs are to be paid by Texas Eastern since it owns the leases. It appears virtually impossible, from the record, to determine the future costs to Texas Eastern for the Rayne Field since they are

¹⁵ The revenue from the sale of this condensate and plant liquids goes first, to partially reimburse Continental for the management and operation of Rayne Field and, second, the remainder to Continental *et al.* as their interests may be, until the mortgage from buyer to sellers is paid in full. Thereafter any revenue from this source is to be retained by Texas Eastern.

(4107)

predicated upon assumptions and estimates. The costs are actually unimportant since the issue here depends upon the base price at which the public interest requires the Rayne Field gas from Texas Eastern. This "in line" price will subsequently be developed.

4108

Since this is a certificate hearing under Section 7 of the Act the immediate use is to determine at what price—as CATCO says, under what conditions—may Texas Eastern dedicate the Rayne Field gas to interstate use, to state this issue in different words, with the same purport, at what price does the public convenience and necessity¹⁰ require the Rayne Field gas from Texas Eastern? In considering these conditions—or the initial price—the Examiner will again refer to CATCO, *supra*, and use that decision as his guide, as did the Commission itself in its Opinion No. 351, issued January 22, 1962, in a matter very comparable to these proceedings, to determine an "in line" initial price. In CATCO the Supreme Court said the Act does not require a determination of just and reasonable rates in a certificate application, as is required in a rate case. The Court then went on to say a determination of a "just and reasonable" rate is not a prerequisite to the issuance of a certificate, however, the Commission is required to give most careful scrutiny to proposed initial prices. These must be shown to be required by the public convenience and necessity otherwise the Commission in the exercise of its discretion may attach such conditions to the certificate of public convenience and necessity as it believes necessary or the application must be denied. In its review of the Commission's Opinion No. 322 the Court

¹⁰ The basis for regulation under the Natural Gas Act is the "public interest." Section 1(a) of the Act, see also *F.P.C. v. Sierra Pacific Power Co.*, 350 U. S. 348, 355.

of Appeals, D. C. Circuit, 287 F. 2d 143, 145 in applying the CATCO rule said, "we read that decision as holding that where a natural gas company seeks an unconditional certificate to make new sales of natural gas at proposed prices which are 'out of line' with existing prices, or which will tend to have an inflationary impact on the natural gas market, it is under an obligation to demonstrate upon the record the reasons why such increased prices are justified by the 'public convenience and necessity'." The Court then went on to say the "petitioner claims that the total cost to Texas Eastern for each Mcf of Rayne Field gas will be 22.89 cents, including Louisiana tax of 2.3 cents" and then they said "... we think it clear that the price is high enough to be in the disputed area to which the CATCO rule applies."

The record contains evidence of the cost of purchasing gas, at certificated prices, and transporting this gas to Opelousas, Louisiana—this being the point where the Rayne Field gas enters the Texas Eastern interstate system—to compare these F.O.B. Opelousas prices with the proposed Rayne Field prices.

4109

Texas Eastern says it pays 14.4¢ per Mcf at 15.025 psia for Wilcox Trend gas and the estimated cost for transportation to Opelousas was 9.6¢ per Mcf for a total cost, at that point, of 24.0¢ per Mcf. Gas purchased in Texas Railroad Districts 2 and 4 at 15.6¢ per Mcf at 15.025 psia costs 9.1¢ per Mcf for transportation for an Opelousas cost of 24.7¢ per Mcf and that Pemex gas costing 15.6¢ per Mcf at 15.025 psia costs 9¢ per Mcf transportation for an Opelousas total cost of 24.6¢ per Mcf.

Also the record contains evidence of prices being paid, and related information on sales, in South Louisiana for natural gas under long term contracts dated between Jan-

uary 1, 1958 and June 30, 1959. As will be seen hereafter these prices are not applicable here.

Here, as the Commission said in its Opinion 351, the initial price should be determined as of the dates of the various contracts of acquisition which were initially executed on February 1, 1957 and the application dedicating the gas to an interstate market filed with the Commission on April 22, 1957. Therefore the "in line" price as of April 22, 1957 must be herein determined since that was the date on which the Rayne Field gas was dedicated to an interstate market by Texas Eastern. The area price levels as announced by the Commission in its Statement of General Policy No. 61-1 on September 28, 1960, 24 F.P.C. 818, as amended,¹⁷ were not then applicable and no area rate proceedings have yet been held by the Commission to determine area rate levels.

There is a further reason why the "in line" price must be determined as of April 22, 1957, if this was not so then Texas Eastern might be enriched by the procedural delays herein. The price at the time of the dedication of the gas to an interstate market must be "in line" with other prices in the area as of that period.

4110

While the CATCO case did not define what was meant by a price being "in line" the Ninth Circuit said in the *United Gas Improvement Co. v. F.P.C.*, 283 F. 2d 817, 823

¹⁷ By its Fourth Amendment to its Statement of General Policy No. 61-1, issued October 31, 1961, the Commission said "It is apparent that it would be contrary to the public interest for us to maintain a price level in Southern Louisiana" of 21.5¢ per Mcf at 15.025 psia, plus state taxes, as announced in its First Amendment on October 25, 1960 "which the courts have ruled out of line." We conclude that, effective this date" October 31, 1961, "the ceiling price level for initial sales in Southern Louisiana, inclusive of state taxes, shall be 21.25¢ per Mcf (at 15.025 psia)." Since the Louisiana state tax of of that date was 2.3¢ per Mcf then the base ceiling price, exclusive of state taxes, would be 18.95¢ per Mcf at 15.025 psia.

the "line" to be referred to "may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce" and that the prices must be comparable. See, *Public Service Commission of New York v. F.P.C.*, 287 F. 2d 146, cert. denied 365 U.S. 880; *United Gas Improvement Co. v. F.P.C.* 287 F. 2d 159; *United Gas Improvement Co. v. F.P.C.* 290 F. 2d 133.

In its Opinion 351, the Commission had under consideration, on remand from the Supreme Court in CATCO, a sale of natural gas by the Continental Oil Company—the same Continental Oil Company that thereafter sold its interest in the Rayne Field leases to Texas Eastern—and others to the Tennessee Gas Transmission Company from leases located "below seabed out in the Gulf of Mexico some 15 to 25 miles offshore from Cameron and Vermilion Parishes,"¹⁸ Louisiana," 360 U.S. 378, 382. The CATCO contracts with Tennessee provided for an initial base price of 21.4¢ per Mcf at 15.025 psia, plus 1¢ tax. This price was much higher than Tennessee was then paying for gas. The Commission, in Opinion 351, said at mimeo. page 7, "a price . . . is not in line as of a given time if it is the highest price or in the highest group of prices theretofore paid" and held, as did the Supreme Court, that a 1956 contract for the sale of gas at that initial base price was clearly out of line. A certificate was issued conditioned at a price of 18.5¢ per Mcf at 15.025 psia as being the "in line" price even though that price was higher than the majority of prices in that area in 1956.

In summary, the various initial price computations are as follows, (1) the original gas purchase contracts provided for an initial price to Texas Eastern of 22.6¢ per

¹⁸ Rayne Field is located in Acadia Parish, Louisiana, which is immediately north of and contiguous to Vermilion Parish, and Cameron Parish is immediately west of and contiguous to Vermilion Parish, all in the State of Louisiana.

(4110)

Mcf plus 1.3¢ per Mcf for a total of 23.9¢ per Mcf, see 21 F.P.C. 860, 861; then Texas Eastern acquired the leases and, by their Exhibit X-15 herein, show a total cost of service, including a 6 per cent rate of return plus estimated

4111

Federal income taxes, of \$138,950,200, an average cost of 18.79¢ per Mcf at 15.025 psia, exclusive of Louisiana tax; and in Exhibit X-16, by including the 2.3¢ per Mcf Louisiana tax, the average cost amounts to 21.09¢ per Mcf at 15.025 psia; further, in Exhibit X-17, when the royalty and other outside interest gas is included at 22.6¢ per Mcf, the average cost mounts to 21.37¢ per Mcf and, finally, in Exhibit X-18 when all of its costs, and estimated costs, are computed, the average cost becomes 24.34¢ per Mcf at 15.025 psia. The intervenors and the Staff stress the 24.34¢ per Mcf cost as being "out of line."

Since the Commission lacked jurisdiction over the price which Texas Eastern paid for the Rayne Field leases and the natural gas reserves thereunder then it seems immaterial, at least in a certificate application under Section 7 of the Act, what price was paid. The question then is, at what price does the public interest require the issuance of a certificate of public convenience and necessity dedicating the Rayne Field gas to an interstate market, or should the application be denied. The Ninth Circuit appropriately answered this question in *United Gas Improvement Co. v. F.P.C.* 283 F. 2d 817, 822, when it said, "the public has an interest in both obtaining reasonable rates and the expeditious dedication of needed new gas reserves."

The Commission found in Opinion 351, mimeo. page 6, "the average of the initial base prices for contracts dated during the respective quarters of 1956 weighted by 1958 volumes are as follows: 17.00 cents, 18.22 cents, 17.38 cents, 16.65 cents" and that "a price not in excess of 18.5 cents

would be 'in line,' although higher than the majority of prices in 1956." This, then, was the Commission's "in line" base price, for a volume of natural gas approximately double the Rayne Field estimated reserves, for contracts executed in August of 1956. As hereinabove stated the "in line" base price here is to be determined as of April 1957, some eight months later. Also, the Commission, by its Fourth Amendment to its Statement of General Policy No. 61-1, on October 31, 1961, *more than four years afterwards*, found the ceiling price level for this area to be 18.95¢ per Mcf, which is but .45¢ per Mcf increase in the "in line" price during the four year period of time.

Predicated upon the record herein and the applicable Commission and court decisions it is herewith determined the "in line" base price, exclusive of taxes, at which the public interest requires the issuance of a certificate of public convenience and necessity to Texas Eastern is 18.5¢ per Mcf at 15.025 psia and a certificate of public convenience and necessity, as so conditioned, is herewith issued to Texas Eastern as hereinafter ordered.

4112

It seems to be appropriate now to consider the effect of the Rayne Field gas costs in relation to any future rates of Texas Eastern. Since this is not a rate case under Sections 4 or 5 of the Act, the Rayne Field gas has already become, or will become upon Texas Eastern's acceptance of the conditioned certificate issued herein, part of the combined gas supply available to Texas Eastern's integrated pipeline system, the future rates of which may, as in the past, be predicated on a system-wide cost of service and a system-wide method of allocation. Combining the costs pertaining solely to the Rayne Field gas with the costs of the remainder of the gas supply available to Texas Eastern means "rolling in" gas costs which may be appre-

ciably greater than the average cost of Texas Eastern's gas supply existing immediately prior to Texas Eastern's acquisition of the Rayne Field gas and leases.

Therefore, to make the information, in the manner herein directed, available in identifying costs in any future rate hearing, or other proceedings, a condition will be attached to the certificate of public convenience and necessity herein issued to Texas Eastern to maintain, as a part of its primary corporate books of account, separate accounts and records in a manner which at all times will show: (1) the acquisition costs together with the costs involved in producing the Rayne Field gas which is attributable to the working interest in the leases acquired from Continental *et al.*, and (2) all remaining costs incurred by Texas Eastern to make such gas available to its interstate pipeline system, so that by combining the costs of these two categories, the total cost of the Rayne Field acquisition and gas to Texas Eastern as measured at the tailgate of the Rayne Field processing plant will be separately recorded.

Specifically, Texas Eastern is directed to maintain, during the period Rayne Field gas is available to it, in strict accordance with the Commission's Uniform System of Accounts, supplemental accounts which will at all times provide summary and detailed data respecting the cost of the Rayne Field gas to Texas Eastern, as follows:

- (1) Respecting the costs of the acquisition of the gas leasehold interests, incurred or to be incurred, by Texas Eastern in its transactions with the producer companies, this accounting must at all times be clear, understandable and evidenced by appropriate and sufficient documents, such as copies of contracts, agreements, correspondence and all memoranda including that relating to Federal income taxes;

4113

- (2) The write-off of note payments;
- (3) Concerning additional costs borne or to be borne by Texas Eastern in making the gas available to its interstate pipeline system; all gas plant, depreciation, depletion and amortization reserves, revenues, and revenue credits, operating expenses, depreciation provisions, taxes, etc. i.e., all items which would be involved in a cost of service for the Rayne Field gas to Texas Eastern;
- (4) All inter-company transactions shall be recorded;
- (5) Appropriate records of the Mcf volumes of gas as related to Items (1) through (4) above.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this reopened proceeding, the evidence adduced and the briefs filed, the Presiding Examiner finds and concludes, in addition to the findings and conclusions hereinabove stated, that:

- (1) The Texas Eastern Transmission Corporation (Texas Eastern) is a Delaware corporation whose principal place of business is located at Shreveport, Louisiana, is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.
- (2) The sale of natural gas from the Rayne Field, Acadia Parish, Louisiana, by Texas Eastern, all as more fully described in its application for a certificate of public convenience and necessity and as fully considered hereinabove, is, or will be upon the ac-

ceptance of the conditioned certificate of public convenience and necessity issued herein, made in interstate commerce, subject to the jurisdiction of the Commission, and such sale by Texas Eastern, together with the construction and operation of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

4114

- (3) Texas Eastern is capable of properly doing the acts and performing the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission issued thereunder.
- (4) The sale of natural gas from the Rayne Field by Texas Eastern, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, is required by the public convenience and necessity, and certificates therefor should be issued as hereinafter conditioned and ordered.
- (5) It is necessary and appropriate in the administration of the Natural Gas Act that the initial price charged by Texas Eastern for the sale of natural gas from the Rayne Field in interstate commerce be conditioned at 18.5¢ per Mcf, exclusive of taxes, at 15.025 psia.
- (6) It is further necessary and appropriate in the administration of the Natural Gas Act that Texas Eastern maintain at all times, during the period the Rayne Field gas is available to it, complete and separate records to accurately reflect the total cost of acquiring the Rayne Field leases and the later

costs for producing the Rayne Field gas all as more fully detailed and directed hereinabove.

- (7) The public interest requires the issuance of a new certificate of public convenience and necessity to Texas Eastern conditioned at an initial price of 18.5¢ per Mcf of natural gas at 15.025 psia and further conditioned upon the keeping of separate records by Texas Eastern for the Rayne Field natural gas as hereinabove specified in more detail.
- (8) The conditions hereunto attached to the new certificate of public convenience and necessity herein issued to Texas Eastern are found to be necessary and required by the public convenience and necessity and in the public interest.

4115

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or review by the Commission on its own motion, as provided in its Rules of Practice and Procedure, as amended, that:

- (A) A permanent certificate of public convenience and necessity is hereby issued to the Texas Eastern Transmission Corporation conditioned so that the base price, exclusive of Louisiana state taxes, for the Rayne Field natural gas, from the date of initial service, shall be, until lawfully changed in the manner provided by the Natural Gas Act, 18.5¢ per Mcf at 15.025 psia, the certificate hereby issued is further conditioned to require Texas Eastern Transmission Corporation to keep and maintain complete, accurate and separate records reflecting its costs of acquisition, maintenance, operation, production, revenue, etc. as more completely specified hereinabove.

(4115)

(B) The conditioned permanent certificate of public convenience and necessity herein issued to the Texas Eastern Transmission Corporation is not transferable and shall be effective only so long as it continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations, and orders of the Commission issued thereunder.

(C) The granting of the conditioned permanent certificate of public convenience and necessity to the Texas Eastern Transmission Corporation herein is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Texas Eastern Transmission Corporation.

HARRY W. FRAZEE
Harry W. Frazee,
Presiding Examiner

4149

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-12446, G-12447

TEXAS EASTERN TRANSMISSION CORPORATION

Exceptions of Texas Eastern Transmission Corporation to
Decision of Presiding Examiner Issued June 29, 1962
and Motion for Oral Argument

Docketed September 14, 1962

4150

Now comes Texas Eastern Transmission Corporation (Texas Eastern), applicant in the above proceedings, and files its exceptions to the decision of the Presiding Exam-

iner issued herein on June 29, 1962, and moves for oral argument thereon.

1

Texas Eastern excepts to Paragraph (A) of the Examiner's proposed order, Paragraphs (2), (4), (5), (7) and (8) of the Examiner's findings and conclusions, and Pages 10 through 16 of the Examiner's decision, wherein the Examiner attempts to grant Texas Eastern a certificate of public convenience and necessity authorizing the sale by Texas Eastern of natural gas from the Rayne Field conditioned at an initial price of 18.5¢ per Mcf, exclusive of taxes, at 15.025 psia and as grounds for this exception, Texas Eastern would respectfully show the following:

(a) This proceeding does not involve an application by Texas Eastern for a certificate of public convenience and necessity authorizing the sale of natural gas from the Rayne Field. Instead, the application filed by Texas Eastern in these proceedings seeks a certificate of public convenience and

4151

necessity authorizing the construction and operation of expansion facilities at a total estimated cost of approximately \$49,088,000 and the sale of approximately 101,000 Mcf per day of additional gas to 11 of Texas Eastern's customers under its effective firm rate schedules on file with the Commission. Included in the proposed expansion facilities were a compressor station and 22 miles of 14-inch lateral line to connect the Rayne Field in Acadia Parish, Louisiana, to Texas Eastern's pipeline system at Opelousas, Louisiana. However, Texas Eastern did not propose in its application, as amended and supplemented, to make any separate or identifiable sale of gas from the Rayne Field and the Commission's order of June 23, 1959,

granting to Texas Eastern the certificate of public convenience and necessity requested by its application did not purport to grant Texas Eastern a certificate authorizing any separate or identifiable sale of gas from the Rayne Field. Further, the Commission's order of December 5, 1958, granting Texas Eastern temporary authority to construct and operate facilities and make the sales proposed in its application herein expressly excluded "the proposed Rayne Field lateral and Rayne compressor station." Accordingly the Rayne Field gas could not have been used to make any portion of the initial sales authorized in these proceedings. Since the sales proposed in the instant application are to be made from Texas Eastern's over-all system gas supply rather than the Rayne Field, the Examiner committed obvious error in attempting to grant Texas Eastern specific certificate authorization for the sale of gas from the Rayne Field which was neither requested nor required.

(b) Paragraph (A)(1) of the Commission's order of July 14, 1961, reopening these proceedings directs the Examiner to determine

4152

"Whether the public convenience and necessity require that the certificate issued in these proceedings by our order of June 23, 1959, and set aside by the Court of Appeals, be reissued in whole or in part."

As has been noted above the certificate issued in these proceedings by the Commission's order of June 23, 1959, authorized Texas Eastern "to construct and operate the facilities proposed in the applications filed in Docket Nos. G-12446 and G-12447 herein, as amended and modified; and to sell and deliver to existing customers the additional volumes of gas proposed in these proceedings in the maximum

amount of 101,660 Mcf per day." The Examiner's decision completely ignores the Commission's directive that a determination be made as to whether this certificate should be reissued in whole or in part. Instead the Examiner has elected to issue an entirely "new certificate of public convenience and necessity to Texas Eastern conditioned at an initial price of 18.5¢ per Mcf." (Par. 8 of Examiner's Findings and Conclusions). Apparently this "new certificate" would cover only "the sale of gas from the Rayne Field by Texas Eastern, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor." (Par. 4 of Examiner's Findings and Conclusions).

Texas Eastern, of course, has filed no application for the type of "new certificate" which the Examiner would issue and it is impossible to determine from the decision the point or points of delivery for the sale, the customer or customers to whom the sale would be made, the quantities of gas to

4153

be sold and delivered, or the facilities Texas Eastern is authorized to construct and operate in order to make the sale. It is likewise impossible to determine what disposition the Examiner proposes to make of the \$49,088,000 facilities and 101,660 Mcf per day sales heretofore authorized by the Commission's order of June 23, 1959.

We respectfully submit that the Examiner erred in thus ignoring the issues and realities of this case and in failing to decide that the certificate issued by the Commission's order of June 23, 1959, should be reissued in its entirety.

(c) The Examiner further erred in attempting to fix an initial price of 18.5¢ per Mcf for the Rayne Field gas. This proceeding does not involve any issue as to an initial price to be charged by Texas Eastern for the sale of gas.

(4153)

from the Rayne Field. As has been noted above, this proceeding involves an application filed by Texas Eastern under Section 7 of the Natural Gas Act to construct facilities and to make sales of additional quantities of natural gas under its firm rate schedules on file with the Commission. The application does not propose any separate sale of gas from the Rayne Field or any increase or change whatsoever in Texas Eastern's rate schedules or service agreements. The Rayne Field gas has been connected to Texas Eastern's system as a part of its over-all system gas supply since August 1959 and has been delivered to its customers as an inseparable rolled-in portion of its general gas deliveries under its approved effective rate schedules which can only be changed in accordance with the provisions of Sections 4 and 5 of the Natural Gas Act. Accordingly this proceeding under

4154

Section 7 of the Natural Gas Act has never involved and could not legally involve any issue as to an initial price to be received by Texas Eastern for the sale of gas from the Rayne Field. Moreover, no issue relating to an initial price for the Rayne Field gas was set for hearing or determination by the Commission's order of June 14, 1961, reopening these proceedings. Quite the contrary, the issues set for hearing and determination relate to "the cost of the Rayne Field gas to Texas Eastern and its customers *over the productive life of the field*" and the costs associated with Rayne Field which Texas Eastern might be willing to agree to claim "in *future determinations* of the justness and reasonableness of its rates under Sections 4 and 5 of the Natural Gas Act." (Order of June 14, 1961, Par. (A)(2), (4)). Clearly, therefore, the Examiner erred in ignoring these issues set for trial and determination by the Commission and in attempting to fix an initial

price for a nonexistent, unidentifiable sale of gas from the Rayne Field.

(d) The Examiner's findings and conclusions that Texas Eastern's sale of the Rayne Field gas should be conditioned at an initial or base price of 18.5¢ per Mcf are not supported by any substantial evidence of record in this proceeding, are wholly unrelated to the issues set for trial and determination by the Commission's order of June 14, 1961, and are confiscatory.

2

Texas Eastern excepts to the Examiner's findings and conclusions on Page 10 of his decision that Texas Eastern "by its market showing in the previous hearings herein dedicated this particular Rayne Field gas to out-of-

4155

state markets for resale for ultimate public consumption" and on Page 14 of his decision that "the 'in line' price as of April 22, 1957 must be herein determined since that was the date on which the Rayne Field gas was dedicated to an interstate market by Texas Eastern," and as grounds for this exception respectfully shows the following:

(a) The Examiner's decision that an "in line" price must be determined as of April 22, 1957, is based upon the fallacious reasoning that when Texas Eastern filed its original application in this proceeding on April 22, 1957, it thereby dedicated the Rayne Field gas to an interstate market. (Decision, p. 14). This reasoning completely overlooks the fact that at the time Texas Eastern filed its certificate application on April 22, 1957, it owned no interest whatsoever in the Rayne Field reserves and therefore could not possibly have dedicated the gas to an interstate market. When such application was filed, Texas Eastern's

(4155)

only rights with respect to the Rayne Field gas were represented by four executory gas purchase contracts dated February 1, 1957, between Texas Eastern, as buyer, and Continental, et al, as sellers, which contracts were expressly conditioned, *inter alia*, upon the sellers obtaining satisfactory certificates from the Commission authorizing their sale of the gas to Texas Eastern. The application filed by Texas Eastern did not even request authority to purchase the gas under the gas purchase contracts and, indeed, none was required since the Commission only had jurisdiction over the proposed sale by Continental, et al. Further, as is noted on Page 4 of the Examiner's decision, Continental, et al, terminated the gas purchase contracts with Texas Eastern and withdrew their

4156

applications for certificates which had been consolidated for hearing with Texas Eastern's application of April 22, 1957. Clearly, therefore, there could have been no dedication by Texas Eastern of the Rayne Field gas on April 22, 1957, and if any dedication by any one ever occurred, it was certainly revoked when Continental, et al, cancelled the gas purchase contracts and withdrew their certificate applications.

(b) Texas Eastern's agreement to purchase the Rayne Field leases was not executed until December 4, 1958 (Ex. M-14) and the leases were not acquired by Texas Eastern until July 27, 1959. (R. 1831). In August 1959 Texas Eastern connected the Rayne Field gas to its interstate system and since that time the gas has been delivered to its customers as a part of Texas Eastern's system gas supply. However, the Rayne Field gas has never been dedicated by Texas Eastern to any particular sale or to its interstate market in the sense that an independent producer dedicates specific leases to the performance of a single contract with

a particular pipeline buyer. Indeed, it is well recognized that a pipeline company's reliance on leases which it owns as a part of its system gas supply in a Section 7 certificate application does not constitute a dedication of the leases. See *Federal Power Commission v. Panhandle Eastern Pipe Line Company* (1949), 337 U.S. 498; *Northern Natural Gas Company* Opinion No. 230 issued June 24, 1952, 11 F.P.C. 174; *Northern Natural Gas Company* Opinion No. 230-A issued October 28, 1952, 11 F.P.C. 400; *Northern Natural Gas Company* Opinion No. 247 issued April 23, 1953, 12 F.P.C. 66; and *Panhandle Eastern Pipe Line Company* Opinion No. 269 issued April 15, 1954, 12 F.P.C. 53.

4157

(c) The Examiner's reasoning that Texas Eastern dedicated the Rayne Field gas to an interstate market on April 22, 1957, is completely refuted by the earlier portions of his own decision. For example, on Page 4 of the decision, the Examiner observes that by its Opinion No. 322 on June 23, 1959, in this proceeding, the Commission found that "The Rayne Field is one of the few large and fully developed gas reserves *not presently committed to and serving a market.*" (Emphasis in Examiner's decision). Further, on Page 8 of his decision, in correctly finding that the acquisition of the Rayne Field leases by Texas Eastern on July 27, 1959, was not subject to the jurisdiction of the Commission, the Examiner states that "the natural gas under the Rayne Field leases acquired by Texas Eastern *had not, at the time of the acquisition, been dedicated* to any sale in interstate commerce." (Emphasis supplied).

(d) The Commission did not instruct the Examiner to determine an in line price for the Rayne Field gas purchase contracts of February 1, 1957, which never became effective and which have long since been terminated and cancelled. Instead, the Commission's order reopening these proceed-

(4157)

ings is specifically directed to designated issues concerning the cost of the Rayne Field lease acquisition which did not occur until July 27, 1959. The uncontradicted evidence establishes that the lease acquisition was accomplished at a price and under terms and provisions completely different from those

4158

which prevailed under the cancelled gas purchase contracts.¹ In its order denying rehearing and clarifying its Opinion 351 in CATCO, the Commission recognized that in 1957 and 1958 "the situation changed substantially" from that which prevailed up to August 1956 when the CATCO contracts were executed. (Slip Op., p. 2). Obviously, therefore, the Examiner erred in failing to consider the evidence relating to the prices and conditions which prevailed at the time Texas Eastern acquired the Rayne Field leases and in placing complete reliance upon an opinion based on evidence not of record in this proceeding concerning a price period ending approximately 3 years prior to the Rayne Field acquisition.

(e) The Commission's order of July 14, 1961, reopening these proceedings does not authorize the Examiner to attempt to determine an "in line price" for the Rayne Field gas as of April 22, 1957, or any other date or dates. On the contrary, the order clearly negates any possibility of an issue regarding an in line or initial price by expressly directing the Examiner to determine "whether the cost of the Rayne Field gas to Texas Eastern

¹ In its order approving a general rate settlement proposal and terminating proceedings issued June 28, 1962, in The Ohio Oil Company, Docket Nos. RI60-92, et al, the Commission found that a renegotiated price of 20.2¢ per Mcf should be considered in the nature of an initial price where no sales had been made under the base contract until after the pricing provisions were renegotiated. In the same opinion the Commission further found that a sale under a permanent contract which superseded sales under a temporary contract between the same parties could be deemed in the nature of an initial rate.

4159

and its customers *over the productive life of the field* is out of line. The Examiner erred in ignoring this directive from the Commission and in attempting to decide a non-existent in line *price* issue having no application to or bearing upon the facts of the instant proceeding.

(f) The Examiner further erred in finding that if an in line price is not determined as of April 22, 1957, "then Texas Eastern might be enriched by the procedural delays herein." (Decision, p. 14). This observation by the Examiner displays a basic misunderstanding of the issues involved in this proceeding. It also serves to underscore the fallacy in the Examiner's approach of attempting to render a decision on the fictitious assumption that Texas Eastern is an independent producer making a sale of gas at the wellhead in the field to a pipeline buyer.

An application by an independent producer for a certificate under Section 7 of the Natural Gas Act always involves a sale under an entirely new rate schedule for a particular gas reserve. Accordingly the Commission required to examine the proposed initial price under the new rate schedule to protect the public from the possibility that the independent producer may receive an unreasonably high initial rate. Unlike an independent producer application, the application in the instant case merely proposes increased sales under Texas Eastern's existing firm rate schedules. Thus, there is no possibility of an unreasonably high initial rate for the Rayne Field gas.

In addition there is no possibility of any future unjust enrichment to Texas Eastern by reason of its acquisition of the Rayne Field gas. If, as, and when Texas Eastern becomes involved in a future Section 4 or 5 rate pro-

4160

ceeding under the Natural Gas Act, it will only be entitled to a reasonable cost of service for the Rayne Field based

(4160)

upon its reasonable and prudent investments and costs in the field. To deny it less would confiscate its property.

3

Texas Eastern excepts to the Examiner's findings and conclusions that the Commission's Opinion No. 351 issued January 22, 1962, involved "a matter very comparable to these proceedings," and to the Examiner's reliance upon said Opinion No. 351 as the basis for his decision herein, and as grounds for this exception respectfully shows the following:

(a) Opinion No. 351 in CATCO is concerned solely with the *initial* price to be received by independent producers for the sale of gas at off-shore platforms to a single pipeline purchaser under ordinary gas purchase contracts executed in August of 1956. In fixing the initial price to be received by the producers, the Commission did not concern itself with the cost of the gas to the pipeline purchaser or its customers either initially or over the productive life of the field. Clearly, therefore, if Opinion No. 351 in CATCO is at all applicable to the Rayne Field lease acquisition, it is applicable only with respect to the reasonableness of the price Texas Eastern paid Continental, et al, for the Rayne Field leases. The uncontroverted evidence establishes that this price expressed on a unit basis amounted to an average

4161

price of approximately 17.15¢ per Mcf at 14.73 psia² or

² The average unit price of 17.15¢ per Mcf was determined by dividing the total purchase price of \$134,395,700 by the quantity of 793,493,800 Mcf representing the working interest share of Continental, et al, in the proved recoverable gas reserves underlying the leases. This price does not include any credit for the value of the liquids Texas Eastern will receive after the expiration of the production payment reserved by Continental, et al. If credit is given for the value of the liquids, the unit price, after all estimated costs of developing, operating, etc. over the life of the production, is reduced to 16.57¢ per Mcf at 14.73 psia. (Ex. X-4).

17.49¢ per Mcf at 15.025 psia. (R. 1355). Obviously this 17.49¢ per Mcf average price paid by Texas Eastern to Continental, et al, for the Rayne Field leases is not out of line even with the 18.5¢ per Mcf *initial* price, exclusive of taxes, which the Commission permitted the CATCO producers to receive under contracts dated approximately 3 years *prior* to the Rayne Field lease acquisition. The Examiner, however, apparently has not utilized the Commission's Opinion No. 351 in CATCO as a basis for determining the reasonableness of the price paid to the producers for the Rayne Field leases, but, instead, has attempted to use such opinion as a yardstick for measuring an initial or base price to be charged by Texas Eastern for the sale of gas from Rayne Field. Since Texas Eastern makes no separate or identifiable sale of gas from the Rayne Field, we are at a loss to understand exactly what the Examiner intended to accomplish by his finding of an initial price of 18.5¢ per Mcf, exclusive of taxes, for the Rayne Field gas. However, if the Examiner intended to thereby encompass or include any cost incurred by Texas Eastern in addition to the price paid to the sellers of the leases, he com-

4162

mitted obvious error in placing reliance upon the Commission's Opinion No. 351 in CATCO dealing solely with the initial price to be received by producer sellers without regard to the cost of the gas to the pipeline purchaser and its customers over the life of the production.

(b) In its order reopening these proceedings the Commission directed the Examiner to determine "whether the cost of the Rayne Field gas to Texas Eastern and its customers *over the productive life of the field* is out of line." Accordingly the cost studies introduced in evidence in the reopened proceeding include all estimated costs to be incurred by Texas Eastern in developing, producing, gather-

(4162)

ing, processing and delivering the Rayne Field gas into its system at high pressures over the entire life of the production from the field. Briefly, these cost studies showed the following:³

(1) The price paid by Texas Eastern for the sellers' working interest in the Rayne Field leases expressed on a unit basis is approximately 16.57¢ per Mcf at 14.73 psia or 16.90¢ per Mcf at 15.025 psia after taking into account all estimated costs of developing, gathering and delivering the gas over the entire life of the production and after

4163

crediting Texas Eastern with the value of the separator liquids it is entitled to receive upon expiration of the production payment reserved by the sellers. (Ex. X-4).

(2) If royalty payments and Louisiana Severance Taxes at current levels are added to the abovementioned average unit price for the working interest gas, the resulting unit cost is 19.13¢ per Mcf at 14.73 psia or 19.44¢ per Mcf at 15.025 psia. (Ex. X-14).

(3) The addition of a 6% rate of return on Texas Eastern's net plant, plus Federal income taxes related to such return, results in an average unit cost of 20.95¢ per Mcf at 14.73 psia or 21.37¢ per Mcf at 15.025 psia. (Ex. X-17).

(4) The further addition of a 6% rate of return to Texas Eastern on its "other deferred debit account"

³ All cost studies were introduced by Texas Eastern with the explanation that it is impossible to precisely predict the exact cost of producing the Rayne Field gas over the entire life of the production, because the cost will necessarily vary with different rates of production and over variables inherent in any gas production over the life of the leases. However, Texas Eastern has prepared all such cost studies on the basis of a rate of production which it considers to be reasonable.

and Federal income taxes related to such return results in an average unit cost of 23.86¢ per Mcf at 14.73 psia or 24.34¢ per Mcf at 15.025 psia. (Ex. X-18).

Obviously any attempted comparison of the estimated average cost to Texas Eastern of gathering, compressing and delivering the Rayne Field gas at high pressures into Texas Eastern's system over a period of 29 years with the *initial* price awarded to the CATCO producers is tantamount to a comparison of apples and oranges. In fact, if the Examiner had considered only one of the many costs which will be incurred by the pipeline purchaser

4164

of the CATCO gas in addition to the initial price paid to the sellers, he would have found that the estimated *cost* of the Rayne Field gas to Texas Eastern and its customers *over the entire productive life of the field* is not out of line even with the *initial cost* of the CATCO gas to the purchaser and its customers. For example, the Commission found in its CATCO Opinion No. 351 that the pipeline purchasing the CATCO gas will incur a cost of approximately 4¢ per Mcf in transporting the gas from the offshore platforms to the shore of Louisiana.⁴ When this gathering cost is added to the 20¢ per Mcf initial price awarded to the sellers for that portion of the gas produced from areas subject to the Louisiana State Severance Tax (Opinion

⁴ In referring to this transportation cost, the Commission stated:

"Under its arrangements with the CATCO companies Tennessee carries the gas which it has purchased and the condensates owned by CATCO in its gathering lines from the offshore platforms to the shore of Louisiana. As to transporting its own gas, we see no reason why the cost of such transportation should not be borne by Tennessee, because it is Tennessee's custom to extend pipelines to the gas supplies. We think these transportation costs should be considered to be nearer the staff's 4 cents per Mcf based on a period closer to the test year than the examiner's 1.98 cents per Mcf based on developments extending to 1963." (Opinion, p. 15).

(4164)

351, p. 17), it results in an initial cost of 24¢ per Mcf to the pipeline buyer and its customers for the CATCO gas on the Louisiana shore. Obviously even the highest estimated *average cost* of the Rayne Field gas to Texas Eastern and its customers at Opelousas, Louisiana, *over the entire life of the production* is not out of line with this *initial cost* of CATCO gas

4165

to the purchaser on the shore of Louisiana at a time 3 years prior to the Rayne Field lease acquisition. Further, as will be noted below, if the Examiner had given proper consideration to the many other elements of *cost* which the purchaser of the CATCO gas lease must bear over the life of the CATCO production, he would have inevitably found that the *cost* of the Rayne Field gas to Texas Eastern and its customers over the life of the production will be substantially less than the comparable *cost* of the CATCO gas.

(c) The Examiner's finding that the Commission's Opinion No. 351 in CATCO involves "a matter very comparable to these proceedings" completely ignores the many substantial variations and disparate provisions between Texas Eastern's Rayne Field lease acquisition and the CATCO contracts. His error in this respect is clearly revealed by the court's opinion in *United Gas Improvement Company v. Federal Power Commission* (9th C.A. 1960), 283 F. 2d 817, 823, cert. denied 265 U.S. 879, wherein the court stated:

"Existing producer prices are relevant for comparative purposes only if they pertain to gas production in the same or an analogous area and if other principal features of the contracts are fairly comparable. Thus the contracts should be comparable from the standpoint of gas reserves and future potentials. The significance of any disparities existing as to these conditions should

be explained by Commission findings based upon substantial evidence. Substantial variation in the quality of gas sold should be similarly treated. The Commission followed this course in Transwestern Pipeline Co. et al., 22 F.P.C. 391. Disparate provisions relative to facilities to be provided and other services to be rendered should be given effect as well in determining the propriety of the analogy to rate under other existing contracts."

If the Examiner had followed the above quoted admonition of the Ninth Circuit Court of Appeals, he would have found that the many disparities between

4166

the entirely different Rayne Field lease acquisition and CATCO contracts⁵ include the following:

(1) The Texas Eastern exhibits showing the estimated cost of the Rayne Field leases include all costs of compressing and delivering the Rayne Field gas into Texas Eastern's system at a pressure of not less than 1000 psig throughout the life of the production. (Ex. X-14). The CATCO contracts, on the other hand, specifically provide that the sellers shall not be obligated to install or operate compression facilities in order to deliver the gas to the buyer. (CATCO Contracts, Section 8(a)). Moreover, the CATCO contracts obligate the buyer to reduce the operating pressure in its system at any delivery point down to a pressure of 700 psig in the event the flowing pressures of the sellers' wells decline to the extent that the contract

⁵Since the Examiner has relied almost entirely upon the Commission's Opinion 351 in CATCO as the basis for his decision in this proceeding, Texas Eastern requests the Commission to take judicial notice of the terms and provisions of the CATCO contracts which are on file with the Commission as Continental Oil Company Rate Schedule No. 154, The Atlantic Refining Company Rate Schedule No. 185, Cities Service Production Company Rate Schedule No. 6 and Tidewater Oil Company Rate Schedule No. 72.

(4166)

quantity cannot be delivered to the buyer against the operating pressure in the buyer's system. (CATCO Contracts, Section 8(c)).

(2) In the event Texas Eastern should take a quantity of gas less than the note payments for the Rayne Field lease acquisition, Texas Eastern has an unlimited right to make up for the gas ~~not~~ taken over the entire pro-

4167

ductive life of the field. (R. 1915). However, under the CATCO contracts the buyer is obligated to take or pay for a Daily Contract Quantity of gas equal to 1,000 Mcf for each 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves. (CATCO Contracts, Section 3 (a)). This Daily Contract Quantity *must be taken or paid for each and every day* during the term of the contract, except during the calendar months of July, August and September when the buyer is permitted to reduce its takes by only 25%. (CATCO Contracts, Section 3(b)). In the event of such a reduction in takes, the buyer has only nine calendar months following the last month during which the reduction was in effect to make up for the aggregate volume which the buyer did not take. (CATCO Contracts, Section 3(c)). This is the only right of make up which the buyer has under the CATCO contracts. Except for such restricted and limited right of make up, any gas not taken on any day must be paid for and is irretrievably lost to the buyer. This is a far cry from Texas Eastern's right to take gas represented by the note payments in any amounts and at any time or times it chooses over the entire productive life of the field.

(3) By acquiring the Rayne Field leases, Texas Eastern obtained complete flexibility in takes and is privileged to completely shut in the field or to produce the wells on any day or days up to their maximum efficient rates of flow.

(R. 1915). Under the CATCO contracts the buyer is saddled with stringent daily minimums and at the maximum is entitled to take only the *smallest* of (a) a quantity equal to the maximum efficient rates of flow of the wells; or (b) the allowable rates of flow of the wells; or (c)

4168

a quantity equal to 125% of the Daily Contract Quantity. (CATCO Contracts; Section 3(d)).

(4) The amount Texas Eastern is obligated to pay the sellers of the Rayne Field leases is fixed for all time (R. 1915) while under the CATCO contracts the price escalates at the rate of 1¢ per Mcf every 4 years. (CATCO Contracts; Section 10).

(5) The Rayne Field gas has a heating value ranging from 1,030 to 1,050 Btus per cubic foot after processing (R. 2302), whereas the CATCO producers are only obligated to deliver gas having a heating value of not less than 1,000 Btus per cubic foot. (CATCO Contracts, Section 7(a)).

Any fair and impartial comparison of the aforementioned restrictive terms and provisions of the CATCO contracts with the flexibility and freedom Texas Eastern achieves through the Rayne Field lease acquisition will readily reveal that the lease acquisition is far more advantageous to the purchaser and the ultimate gas consumers. Indeed if the additional costs of compression in later stages of production, possible price escalations, cost of gas paid for but not taken, restricted flexibility in takes, lower Btu content, transportation from a more remote area, etc. are added to the base *initial* cost of approximately 24¢ per Mcf for the CATCO gas on shore, it becomes crystal clear that under any estimate the average cost of the Rayne Field gas to Texas Eastern over the life of the production will be far less than that which will be incurred by the purchaser of the CATCO gas.

Texas Eastern excepts to the Examiner's findings and conclusions on Page 12 of his decision that the costs of the Rayne Field gas to Texas Eastern "are actually unimportant since the issue here depends upon the base price at which the public interest requires the Rayne Field gas from Texas Eastern," and as grounds for this exception would respectfully show the following:

(a) The Examiner's attempt to fix a base or initial price for the Rayne Field gas without regard to the cost of the gas to Texas Eastern is patently arbitrary, capricious and confiscatory. Clearly, the public interest does not require, and the Natural Gas Act does not permit, the establishment of a base price for pipeline-produced gas which does not allow the pipeline to recover its reasonable and prudent investment and costs. In the instant proceedings the undisputed substantial evidence establishes that the price paid by Texas Eastern for the Rayne Field leases was a reasonable and prudent investment by Texas Eastern's management in the light of the then existing circumstances. The Examiner has not made and could not in good conscience make any finding to the contrary. Accordingly the Examiner clearly erred in completely disregarding the issues and the evidence of Texas Eastern's costs and further erred in fixing an initial price for the sale of the Rayne Field gas solely on the basis of the Commission's Opinion No. 351 relating to a non-analogous sale by independent producers. In fact, even if Opinion No. 351 were applicable here, it certainly would not constitute authority for the Examiner's attempt to fix a confisca-

tory initial price for the Rayne Field gas without regard to Texas Eastern's reasonable and prudent costs. In Opinion

No. 351, the Commission expressly considered the costs of the independent producers and found that "an initial price of around 18½ cents would cover the CATCO costs, include an incentive for continued exploration and development either in the Cameron area or elsewhere, and would provide a margin for error on the disputed points, particularly in case the Cameron area reserves were not as great as found by the examiner." (Slip Op., p. 16).

(b) The Examiner's decision ignores the basic fact that this reopened proceeding involves only issues relating to the cost of pipeline-produced gas. Since there are no pending proceedings with respect to Texas Eastern's rates under either Section 4 or 5 of the Natural Gas Act, there can be no issue as to an initial price for the gas which has been connected to Texas Eastern's system for approximately 3 years. Moreover, even if an issue as to an initial price for the Rayne Field gas it could not be decided on the basis of the Commission's Opinion No. 351 fixing an in line price for a non-analogous sale by independent producers. In *City of Detroit, Michigan v. Federal Power Commission* (CADC 1955), 230 F. 2d 810, cert. den., 352 U.S. 829, the Court of Appeals made it quite clear that the Commission has no authority to price pipeline-produced gas for rate purposes solely on the basis of field prices, holding that the Commission was required to consider the conventional rate base method in its treatment of pipeline-produced gas for rate-making purposes at least as a point of departure. Clearly, therefore, the Examiner erred in attempting to fix an initial price for the Rayne Field gas

4171-

and further erred in attempting to establish such price without regard to Texas Eastern's reasonable and prudent costs and investments in the Rayne Field.

Texas Eastern excepts to the Examiner's findings and conclusions that the "evidence of prices being paid, and related information on sales, in South Louisiana for natural gas under long term contracts dated between January 1, 1958, and June 30, 1959" is "not applicable here," to the Examiner's failure to consider the issue of "whether the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is out of line" and to the Examiner's further failure to find that such costs are not out of line, and would respectfully show the following:

(a) As has been noted above, the Commission's order of July 14, 1961, reopening these proceedings specifically directs the Examiner to determine:

"Whether the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is out of line."

Notwithstanding this specific Commission directive, the Examiner arbitrarily refused to consider either the issue or the voluminous evidence concerning it offered by Texas Eastern at the reopened proceeding. We respectfully submit that the Examiner thereby committed prejudicial error and that the Ex-

4172

aminer further erred in failing to find and determine that the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is not out of line on the basis of the following undisputed substantial evidence of record in these proceedings:

- A. *The Examiner erred in failing to find that the cost of the Rayne Field gas to Texas Eastern and its customers is in line with the cost of existing gas supplies connected to Texas Eastern's system at field prices below uncontested prevailing area prices.*

Since the Commission's order reopening these proceedings does not set forth the standards to be followed in a determination of "whether the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is out of line," Texas Eastern proved that such cost was "in line" under all of the approaches heretofore followed by the Commission in other cases.

In our opinion the many basic differences between the cost of pipeline-produced gas over the life of the leases and initial prices paid to sellers under ordinary gas purchase contracts make it impractical to attempt to utilize contract prices as a guide line. Moreover, the base price paid to a seller under a gas purchase contract in the field never represents all of the costs of the gas to the pipeline buyer and its customers.

For the foregoing reasons we believe the most practical approach to a determination of the issue of whether the cost of the Rayne Field gas to Texas

4173

Eastern and its customers is out of line is a comparison of the cost of the Rayne Field gas with the cost to Texas Eastern and its customers of other gas connected to Texas Eastern's system at the time of the Rayne Field lease acquisition. A similar approach was utilized by the Commission in its Opinion No. 349 in *Tennessee Gas Transmission Company*, Docket Nos. G-20388, et al, wherein the Commission authorized Tennessee to construct facilities to make

(4173)

a non-jurisdictional purchase of gas from Trans-Canada at a price of 37¢ per Mcf, stating:

"Secondly, the examiner found that the proposed purchase price of 37 cents per Mcf in Canadian money had not been shown to be in the public interest. We disagree. We find the evidence shows that the price is 'in line' with the cost of making southwest gas available in TBI's northern and New York rate zones." (Emphasis supplied). (Slip Op., p. 4).

In the instant case the uncontradicted evidence conclusively establishes that the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is in line with the cost of making existing large blocks of gas on Texas Eastern's system available in the Rayne Field vicinity. Mr. Gordon Jennings, Supervisor of the Plans and Research Division of Texas Eastern's Engineering Department, introduced studies of the actual costs of making Pemex, South Texas and Wilcox Trend System gas presently connected to Texas Eastern's system available at Opelousas, Louisiana, where the Rayne Field gas enters the system. (R. 1860-1865). His studies establish that even though Texas Eastern is currently purchasing all of such other gas at prices far below the ceiling prices es-

4174

established for such areas by the Commission's Statement of General Policy No. 61-6, the cost of making such gas available at Opelousas, Louisiana, in most instances exceeds even the highest estimate of the cost of the Rayne Field gas at the same point over the productive life of the field. Mr. Jennings' cost studies, computed on an Mcf basis at 15.025 psia, were as follows:

Location	Existing Contract Price	Transportation Cost	Total
Wilcox Trend System	14.04¢	9.06¢	24.0¢
South Texas*	15.6¢	9.1¢	24.7¢
Pemex (Texas-Mexico Border)	15.6¢	9.0¢	24.6¢

* An average transportation cost of 1.6¢ to 1.8¢ per Mcf per 100 miles was used, it being the average computed transportation cost of this case. (R. 1860, 1865).

In addition, Mr. Jennings made further estimates of the cost of making the Pemex and South Texas gas available on the basis of the average prices payable for the gas over the contract term. (R. 1862). The results of these computations are as follows:

Location	Average Price for the Term of Contract	Further Compression Costs	Transportation Costs	Total
Pemex	16.8¢	None	9.0¢	25.8¢
South Texas	16.7¢	0.33¢**	9.1¢	26.1¢

** An average cost of 1¢ per Mcf has been reduced to 0.33¢ per Mcf for the reason that only $\frac{1}{3}$ of the reserves are estimated to be subject to this cost. (R. 1862).

4175

Obviously the Examiner erred in failing to consider the foregoing evidence and in failing to find that the public interest requires the continued attachment of the Rayne Field reserves to Texas Eastern's system at a stable cost to its customers in line with the cost of other existing gas supplies which have been connected to Texas Eastern's system for several years.

B. The Examiner erred in failing to find that the cost of the Rayne Field gas to Texas Eastern and its customers is in line with the cost of Texas Eastern's other company-produced gas.

The evidence establishes that the cost of the Rayne Field gas to Texas Eastern and its customers is below the cost

(4175)

of making other Texas Eastern company-producer gas available in the Rayne Field vicinity: Mr. Osborn, Texas Eastern's Comptroller, testified that a study prepared under his direction in Texas Eastern's Docket Nos. G-12706 and G-18841 resulted in a unit cost of 44.34¢ per Mcf for its company-produced gas exclusive of the Rayne Field. (R. 1945). In these same dockets the Commission Staff developed a cost of 23.2781¢ per Mcf for such company-produced gas. (R. 1945). The foregoing costs represent only the cost of the gas in the field. The addition of gathering, compression and transportation costs from the wellhead to the Rayne Field vicinity, of course, would result in a cost far in excess of Rayne.

4176

C. *The Examiner erred in failing to find that the cost of the Rayne Field gas to Texas Eastern and its customers is in line with the cost to the consumers of comparative permanently certificated sales in South Louisiana.*

In addition to establishing that the cost of the Rayne Field gas is "in line" with the cost of other gas connected to its system, Texas Eastern proved that under any proper comparable basis the estimated cost of the Rayne Field gas is not out of line with previously uncontested, certificated sales to other pipelines in the South Louisiana area. For example, Mr. Furman of Foster Associates, Inc. prepared detailed statistics of final uncontested certificates authorizing prices at 20¢ per Mcf and above since 1954 when Commission regulation of producers began. (R. 1845, 1846). Mr. Furman's exhibits reveal that the Commission has finally approved initial prices of 20¢ per Mcf or higher for gas purchase contracts in South Louisiana dating as far back as 1952. (Ex. X-6, Schedule 9). In 28 instances final uncontested certificates for sales in South Louisiana have authorized initial base prices, plus tax re-

(4177)

imbursement, ranging from 22¢ per Mcf to 24.05¢ per Mcf and 50 of the contracts shown on Mr. Furman's schedule of final uncontested certificates provide for average base prices ranging from 24.5¢ per Mcf to 28.35¢ per Mcf. (R. 1845).

It should be noted that practically all of the certificated sales shown on Mr. Furman's exhibits involve much smaller, less accessible reserves than the Rayne Field. Moreover, the prices shown thereon represent only the

4177

base price, plus tax reimbursement, payable to the seller. Costs to the pipeline buyers of prepayments, take or pay obligations, gathering, compressing, treating and transporting the gas are not shown. Accordingly it is obvious that adjustments must be made if such contract prices are to be compared with the average cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field. In fact, the relative superiority of the Rayne Field lease acquisition over a gas purchase contract has heretofore been recognized by the Commission in its Opinion No. 322 in this proceeding, wherein the Commission stated:

"Furthermore, the price Texas Eastern will pay for the Rayne Field leases is fixed for all production from this field, and is not subject to the annual price escalations and indeterminate price increases provided for in the gas purchase contracts. . . .

"The public will otherwise benefit from Texas Eastern's acquiring these leases instead of purchasing the gas under the producer sales contracts. For example, Texas Eastern will acquire control over the rate of production, and the minimum take or pay for provisions of the gas purchase contracts will be eliminated,

(4177)

thereby increasing the flexibility of the company's overall pipeline operations. Further, since the purchase of the leases is not a contract to purchase gas, the price paid for the leases cannot have a disruptive effect on area prices by triggering favored nations or price redetermination clauses in Texas Eastern's or any other pipeline company's contracts. Other benefits also exist."

In referring to some of the many advantages which the Rayne Field

4178

lease acquisition offers over the usual type gas purchase contract, Mr. John Jacobs, Vice President in Charge of Texas Eastern's Gas Supply, pointed out that:

(1) The usual gas purchase contract gives the buyer only limited rights to take swings on the gas production, whereas ownership of the Rayne Field leases enables Texas Eastern to achieve complete flexibility in its takes from the field which have varied from 0 Mcf per day to as much as 181,679 Mcf per day.

(2) Gas purchase contracts normally contain take or pay for provisions with only a limited right of make up by the buyer, whereas by acquiring the Rayne Field leases, Texas Eastern has an unlimited make up right.

(3) The Rayne Field lease acquisition cost is fixed for all times while the initial base prices under gas purchase contracts are all subject to fixed price increases as well as indeterminate price increases through favored nation and price redetermination clauses; and

(4) The cost estimates of producing the Rayne Field gas include all costs of compression and gathering throughout

• 21 F.P.C. 860, 866.

(4179)

the life of the production, while the gas reserves shown on Mr. Furman's exhibits are scattered throughout more remote areas of Southern Louisiana with the result that the buyers will incur considerable additional costs in gathering, compressing and transporting such gas to the Rayne Field vicinity. (R. 1915, 1921-1922).

The uncontroverted testimony of Mr. Jacobs establishes that when the foregoing and other advantages of the Rayne Field lease acquisition are

4179

taken into account, gas purchase contract prices in the area should be adjusted upward by an amount ranging from 5¢ per Mcf to 10¢ per Mcf for comparative purposes. (R. 1915, 1922).

The necessity of making adjustments of the type referred to by Mr. Jacobs for comparative purposes is well established by the opinions of the Commission and the courts. For example, the fact that credit must be given for the stability of the Rayne Field price and the absence of any possibility that the sellers may file for either fixed or indeterminate price increases during the entire life of the production is demonstrated by the Commission's opinion in *Trunkline Gas Company, et al*, Docket Nos. G-15394, et al, wherein the Commission certificated producer sales to Trunkline in Texas at an initial price of 20¢ per Mcf even though, with one possible exception, the highest prices theretofore certificated by the Commission in Texas were 17.5¢ and 18¢ per Mcf (21 F.P.C. 704, 715). In explaining its reasons for granting certificates at the higher price, the Commission stated (21 F.P.C. 704, 719):

"These contracts are unique in several respects. In the first place they involve some of the largest volumes of gas yet committed to the interstate market from the

Texas Gulf Coast area. Secondly, and most important, these contracts provide for a firm 20 cent price for a period of ten years, without escalations or redeterminations. We look with favor on such firm contracts which serve to relieve the pressure on the rising spiral of producer prices caused by the usual provisions for escalations and redeterminations found in most contracts. We emphasize, however, that in the absence of this provision for a firm price, we would not be persuaded that the 20 cent price is required by the public convenience and necessity; and, it will not

4180

be sufficient for producers hereafter seeking certificates to support their applications by reference to our action in this proceeding without taking proper account of this factor of firm price."

The further fact that additional credit must be given for the unusually large size of the approximately one trillion cubic feet of Rayne Field reserves and the ability of Texas Eastern to take unlimited swings on this ideally located reservoir is demonstrated by the Commission's opinion in *The Pure Oil Company*, Docket No. G-17930, 25 F.P.C. 383. In *The Pure Oil Company* case the Commission found that a price of 16¢ per Mcf paid by El Paso Natural Gas Company to West Texas Gathering Company was not "higher" than a price of 10.6¢ per Mcf paid to The Pure Oil Company when considered for comparative purposes, stating (25 F.P.C. 386):

"First, the examiner was of the view that, making the comparisons called for by the favored nation escalation provisions of the Pure contracts to determine whether the price for the West Texas sale was 'higher' than the Pure price, important differences in these

(4181)

sales justified the finding that West Texas' price was not 'higher' than the Pure prices so that the Pure prices had not been triggered by the West Texas price. The principal such difference, according to the examiner, lay in the large average volumes and high pressures of gas available from the West Texas pipeline system, and the manner in which the wells supplying West Texas' system could be utilized in periods of peak demands to meet the heavy requirements from the El Paso system. . . . We conclude that the examiner was correct in finding that the West Texas price is not 'higher' than the Pure prices, within the meaning of the escalation provisions, and that accordingly there has been no escalation of the Pure prices. . . . Beyond any question, the qualities, including deliverability, that give the West Texas gas its premium importance to El Paso for peaking purposes are 'pertinent factors' which reasonably should

4181

be considered in determining whether or not the price for the West Texas gas is 'higher' than the Pure prices. The record establishes that the gas El Paso purchases from West Texas does in fact have unusual properties of deliverability which, in conjunction with the location of the reserves, give it exceptional usefulness for peaking purposes in the operation of El Paso's pipeline system. These qualities, which liken this gas to gas from storage fields, sufficiently distinguish this purchase from the purchases of gas under the Pure contracts."

In affirming the Commission's opinion in The Pure Oil Company case, the Court of Appeals for the Seventh Circuit stated:

(4181)

"The record supports the Commission's conclusions regarding the exceptional physical characteristics of the West Texas gas supply. And, although the factor of location alone does not remove it from application of the favored-nation clauses, the desirable deliverability characteristics due to the extremely high pressure of the wells reasonably warrants the Commission's findings distinguishing the West Texas supply from Pure's gas and that its unefulness and exceptional value for peaking purposes required a conclusion that its price was not actually higher than Pure's on a comparative basis." (299 F. 2d 370).

In its Opinion No. 353 issued March 7, 1962, in *Michigan Wisconsin Pipe Line Company, et al*, Docket Nos. CP-61-102, et al, the Commission authorized the sellers to receive an initial price equal to the area ceiling plus prepayments in the amount of \$4,014,928.17 with full recognition that the amount of the prepayments presumably would be included in the pipeline buyer's rate base as working capital and would "result in an additional cost to its jurisdictional customers." The Commission rationalized that the increased cost to the consumers was warranted because of the increased flexibility in

4182

takes which the prepayments offered the pipeline, stating:

"In view of the proceedings in Docket No. RP60-9, and the conditions here imposed on the proposed initial prices, these cost figures are only rough approximations. Nevertheless, they are sufficient to show that the additional cost to Michigan Wisconsin's jurisdictional customers which may be expected by reason of the prepayments is not unreasonable in light of the benefits to be derived from Michigan Wisconsin's ac-

quisition of these reserves with the right to take the gas as it needs it to meet the Phillips drop-off." (Slip Op., p. 11).

In the instant proceeding the average unit price of approximately 17.49¢ per Mcf at 15.025 psia⁷ paid to the sellers of the Rayne Field leases is clearly in line with uncontested permanently certificated contract prices in the area. The fact that Texas Eastern will be entitled to a reasonable return on its investment and its other deferred debit account which may be likened to a prepayment is likewise not unreasonable in the light of the many benefits which its customers will derive from the acquisition of the Rayne Field leases, particularly in view of the fact that the estimated cost of the gas to Texas Eastern's customers, including a reasonable return to Texas Eastern, will not be out of line with either the cost of existing supplies attached to Texas Eastern's system or the cost of any comparable substitute supply which might be attached to the system.

[Page 4183 is a duplicate of 4182, and is therefore omitted.]

4184

The evidence in this proceeding also establishes that gas sales at relatively long term stable prices or of large volumes command higher prices than those paid under the usual types of gas purchase contracts. For example, Chart 2 and Schedule 7 of Mr. Furman's Exhibit X-6 reveal that during the period from January 1, 1958, to June 30, 1959, sales of gas under contracts containing no provisions for indeterminate price increases commanded an average price (25.9¢ per Mcf) of 2.3¢ per Mcf more than the average price (23.6¢ per Mcf) received for sales under contracts containing indeterminate price clauses. (R. 1841). Chart 1 and Schedule 6 of such Exhibit X-6 also establish that during

⁷ This price is reduced to 16.9¢ per Mcf after all estimated expense if credit is given for the value of the liquids retained by Texas Eastern.

the same period the average base price for small volume purchases was 21.5¢ per Mcf, whereas the average base price in the so-called "large volume class" was 24.3¢ per Mcf. (R. 1839-1841).

D. *The Examiner erred in failing to find that the cost of the Rayne Field gas to Texas Eastern and its customers is in line with the price paid for non-jurisdictional purchases of gas in more remote areas of Texas and Louisiana.*

Any determination of whether the Rayne Field lease acquisition cost is "out of line" on the basis of gas purchase contract prices must necessarily include a consideration of prices paid for non-jurisdictional purchases of gas. These non-jurisdictional purchases have as great, if not greater, impact upon the plateau of gas prices than jurisdictional purchases.

4185

In the instant case the undisputed evidence conclusively establishes that the acquisition cost of the Rayne Field leases is considerably less than prices paid for non-jurisdictional purchases of gas located in more remote areas of Texas and Louisiana. As an example, Mr. Jacobs referred to a gas purchase made by the Texas Electric Power Company from the Old Ocean Field in Brazoria County, Texas, for intrastate consumption at an initial price of 21.5¢ per Mcf with fixed price escalations of 2¢ per Mcf each 4 year period for an average non-regulated price of 26.5¢ per Mcf. He noted that this contract also provided for a Btu price adjustment clause, plus tax reimbursement, to the seller for 100% of any additional taxes. (R. 1916, 1917). In addition, Mr. Jacobs referred to a non-jurisdictional contract of United Gas Pipe Line Company covering the East Bastian Bay Field at a base initial price of 22.5¢ per

Mcf, plus 100% tax reimbursement, for a total initial price of 24.8¢ per Mcf. This price escalates to 27.3¢ per Mcf on July 1, 1962, with provisions for price redeterminations at the end of the 10th and 15th years of the 20 year contract term on the basis of the average of the two highest prices then being paid in South Louisiana. (R:1918). Mr. Jacobs testified that an upward adjustment of 4¢ per Mcf for the non-jurisdictional Old Ocean Field purchase and an adjustment from 3¢ to 6¢ per Mcf to the non-jurisdictional East Bastian Bay Field purchase should be made to cover transportation costs of these reserves to the Rayne Field vicinity for comparative purposes. (R. 1919). He also pointed out that an additional upward adjustment in the amount of approximately 5¢ per Mcf should be made to such gas purchase contracts for the reasons heretofore set forth

4186

with respect to jurisdictional sales. (R. 1919). We submit that the Examiner committed obvious error in completely ignoring the evidence as to these non-jurisdictional sales.

6

Texas Eastern excepts to the Examiner's failure to pass upon the issue of "whether Texas Eastern's proposal is in the public interest even if the cost of the gas to Texas Eastern and its customers proves to be out of line" and to the Examiner's failure to find that Texas Eastern's proposal is in the public interest regardless of whether or not the cost of the gas to Texas Eastern and its customers proves to be out of line, and would respectfully show the following:

Having ignored the Commission's order of July 14, 1961, to determine "whether the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is out of line," the Examiner further neglected

(4186).

to comply with the further order of the Commission to determine:

"Whether Texas Eastern's proposal is in the public interest even if the cost of the gas to Texas Eastern and its customers proves to be out of line."

The question of whether Texas Eastern's acquisition of the Rayne Field leases is in the public interest even if the cost is out of line must, of course, be determined in the light of the circumstances existing at the time of the lease acquisition on July 27, 1959. The undisputed evidence es-

4187

tablishes that the Rayne Field, consisting of approximately one trillion cubic feet of gas, was acquired by Texas Eastern in good faith in order to enable it to better serve the then existing and anticipated future requirements of its customers.

There can be no question that it is in the public interest for Texas Eastern to continually augment its system gas supplies in order to satisfy the ever-increasing urgent requirements of the market area it serves. It is also conclusively established by the evidence in this proceeding that under any reasonable cost estimate Texas Eastern will be able to deliver the Rayne Field gas at a cost to its customers far less than the cost which would be incurred in delivering any comparable quantity of gas available to Texas Eastern's system on July 27, 1959, or today. Moreover, as has been noted above, the evidence establishes that the estimated cost of the Rayne Field gas to Texas Eastern and its customers over the entire productive life of the field is in line with present costs to Texas Eastern and its customers of existing gas supplies connected to Texas Eastern's system.

The Examiner obviously erred in failing to consider the foregoing and other evidence which conclusively establishes that the Rayne Field lease acquisition is in the public interest and in failing to find the following:

- A. *The evidence establishes that the Rayne Field lease acquisition enabled Texas Eastern and its customers to avoid an annual favored nation increase under existing contracts of approximately \$10,000,000.*

4188

It is common knowledge that for many years Texas Eastern has carried on a vigorous and positive program of "holding the line" on the field cost of gas under its existing contracts as well as for its new supplies. The avoidance of favored nation triggering is of peculiar and particular importance to Texas Eastern and its customers because several of its older contracts contain favored nation clauses which would be triggered by a higher Texas Eastern contract price for gas located anywhere within the States of Texas and Louisiana. (R. 1909). Thus any favored nation triggering would result in a relatively larger dollar impact on Texas Eastern's cost of service than would be experienced by most of the other pipelines. (R. 1909).

In order to avoid favored nation triggering, Texas Eastern in the past has followed the practice of extending its system to new areas to satisfy its customers' requirements when the required additional gas supplies could no longer be obtained along its existing system at its prevailing gas prices. (R. 1909). Thus in 1953, Texas Eastern constructed its Wilcox Trend gathering system in Texas Railroad Commission District No. 2, and in 1957 it constructed its South Texas extension along the Gulf Coast in Texas Railroad Commission District No. 4 to a point of connection with Pemex at the Mexican boundary in Hidalgo County,

(4188)

Texas. In each instance these new extensions enabled Texas Eastern to acquire new gas supplies at prices in line with the prevailing prices of its then existing gas supplies, with the result that the new acquisitions had little or no triggering effect on the favored nation clauses of its existing contracts. (R. 1915).

4189

During the time Texas Eastern was extending its system to these more remote areas in Texas, it had refrained from purchasing gas in the prolific gas producing South Louisiana area in order to avoid the favored nation triggering which would have resulted from a purchase at the prevailing price in that area. (R. 1906). However, the time came when Southern Louisiana offered the only large gas reserves available to Texas Eastern's system, and the price being paid and offered for much smaller scattered reserves along its system in Texas was rapidly approaching the prevailing price in Southern Louisiana. (R. 1905, 1906). Accordingly, the purchase of additional gas in Texas would have had almost as drastic a favored nation triggering effect on Texas Eastern's existing contracts as the purchase of gas in Southern Louisiana. (R. 1905).

Texas Eastern, therefore, had no choice except to enter the Southern Louisiana gas market in order to obtain a supply of gas to meet the admittedly urgent needs of its customers. Accordingly, on February 1, 1957, Texas Eastern executed the usual type of gas purchase contracts for the purchase of gas from the large reserves in the Rayne Field, Acadia Parish, Louisiana, at an initial base price of 22.6¢ per Mcf, plus tax reimbursement in the amount of 2.175¢ per Mcf on the basis of present Louisiana taxes. The price escalated at the rate of 0.4¢ per Mcf each year for an average price, plus tax reimbursement of 28.775¢ per Mcf. (R. 1904). It was shown that the purchase of gas at the

initial contract price could result in a favored nation triggering of Texas Eastern's existing contracts in an amount of approximately \$10,000,000 per annum. (R. 1904). Although the initial hear-

4190

ing in these proceedings resulted in a favorable decision from the Examiner, exceptions were filed by a number of Texas Eastern's customers principally upon the ground that the favored nation triggering would be contrary to the public interest. (R. 1906). In the light of these complaints from its customers, Texas Eastern redoubled the efforts it had previously instituted to acquire the Rayne Field leases and thus avoid any favored nation triggering. (R. 1907).

We wish to emphasize that Texas Eastern's negotiations for the purchase of the Rayne Field leases were not prompted by any desire to avoid the jurisdiction of the Commission. Instead, the negotiations were conducted because of a sincere belief on the part of Texas Eastern's management that the lease acquisition would be far more advantageous to Texas Eastern and its customers than the purchase of the Rayne Field gas under gas purchase contracts. Moreover, Texas Eastern had been unsuccessful in repeated attempts to contract for additional gas in Southern Louisiana at its then existing system prices, and the lease purchase constituted the only method known to Texas Eastern whereby it could obtain a supply of gas to satisfy its customers' admittedly urgent requirements without triggering favored nation clauses.

The evidence reveals that after many months of continuous negotiations with the producers, Texas Eastern finally arrived at the lease acquisition arrangement which is the subject of this proceeding. (R. 1907). As is noted in the Commission's opinion herein of June 23, 1959, all

(4190)

of Texas Eastern's customers who had objected to the gas purchase contracts withdrew their ob-

4191

jections in the light of the lease acquisition arrangement so that the lease purchase was opposed only by the New York Public Service Commission. (21 F.P.C. 860).

Following the issuance of the Commission's opinion of June 23, 1959, Texas Eastern on July 27, 1959, consummated the purchase of the Rayne Field leases. As had been predicted in the Commission's Opinion No. 322, the lease acquisition did not have any "disruptive effect on area prices by triggering favored nation or price re-determination clauses in Texas Eastern's or any other pipeline company's contracts." (21 F.P.C. 860, 867). This avoidance of favored nation triggering has enabled Texas Eastern to continue to "hold the line" on its existing gas purchase contract prices, and, in addition, to inaugurate a program of settling its independent producer-supplier rate cases in a manner designed to eliminate all favored nation and other indeterminate pricing clauses from the underlying gas purchase contracts. (R. 1911). This program instituted by Texas Eastern has been sanctioned and implemented by the Commission's Second Amendment to its Statement of General Policy No. 61-1 issued December 20, 1960.

It is submitted that aside from the many other advantages realized by Texas Eastern and its customers from the Rayne Field lease acquisition, the avoidance of favored nation triggering alone, in Texas Eastern's case, clearly establishes that the lease purchase was required by the public convenience and necessity. Such lease purchase represented the only manner in which Texas Eastern could obtain an additional supply of gas to meet its customers' urgent requirements, and, at the same time, hold the line on its

4192

existing prices. The advantages which Texas Eastern, its customers and the public have already realized and will continue to realize in the future by the maintenance of a stable gas purchase price structure on Texas Eastern's system are self-evident. The Examiner erred in failing to consider the evidence concerning these matters.

B. *The evidence establishes that the cost of the Rayne Field gas to Texas Eastern and its customers is far below the cost which would be incurred in connecting a comparable new gas supply to Texas Eastern's system at in line gas purchase contract prices.*

In addition to being in line with the cost of other existing gas supplies on Texas Eastern's system, the cost of the Rayne Field gas is far below the cost which would be incurred in connecting a comparable new gas supply to Texas Eastern's system at in line gas purchase contract prices.

Mr. Jacobs' testimony establishes that at the time of the Rayne Field lease acquisition there were no easily accessible gas reserves on the market in Texas Eastern's gas supply area of a size comparable to the Rayne Field reserves, and that if Texas Eastern should be required to disconnect the Rayne Field from its system, it would require several years to replace such reserves with a comparable quantity of gas. (R. 1923). He further pointed out that in order to obtain a comparable quantity of gas, Texas Eastern would have to attempt to negotiate a large number of gas purchase contracts for much smaller gas reserves scattered along its system and that

4193

at the time Texas Eastern acquired the Rayne Field leases, the initial field price for these reserves in the field would

(4193)

be in the range of 20¢ per Mcf in Texas to 24¢ per Mcf in Southern Louisiana. (R. 1924). His opinion in this respect is further substantiated by the testimony of Mr. Furman that for the period January 1, 1958, through June 30, 1959, the median initial base price, plus tax reimbursement, during such period of time was 25.9¢ per Mcf. (R. 1842). Mr. Furman pointed out that these price ranges for Southern Louisiana purchases have continued to prevail in the area subsequent to June 30, 1959. (R. 1842, 1843).

It is an irrefutable economic fact that Texas Eastern cannot acquire gas supplies under gas purchase contracts at prices less than the prices being paid and offered by its competitors in the same area. However, even if it is assumed, *arguendo*, that Texas Eastern could have acquired a supply of gas of a size comparable to the Ryne Field at the area prices subsequently set by the Commission's Statement of General Policy No. 61-1, it is nevertheless conclusively established by the evidence that, when transported to the Ryne Field vicinity, such gas would cost Texas Eastern and its customers a substantial amount in excess of the cost of producing the Rayne leases. For example, Mr. Jennings testified that he had made engineering design and cost studies to determine the cost of gathering and transporting to Opelousas, Louisiana, several different blocks of gas which Texas Eastern had considered purchasing in the past. Utilizing the then existing area price of 18¢ per Mcf authorized by the Commission for Texas Railroad Commission Districts Nos. 2, 3 and 4, Mr. Jennings pointed out

4194

that the equivalent cost to Texas Eastern at Opelousas, Louisiana, for reserves located in Jim Hogg County, Texas, would be 28.02¢ per Mcf and for reserves located in Duval County, Texas, 31.68¢ per Mcf. (R. 1863). His testimony also shows that the purchase of gas in the Ship Shoal area

offshore of Southern Louisiana at the existing area price of 19.5¢ per Mcf would result in a cost of the gas to Texas Eastern at Opelousas of 27.27¢ per Mcf. (R. 1871). Mr. Jacobs testified that the initial cost of purchasing new gas supplies to substitute for the Rayne Field reserves, plus transportation costs to the Rayne Field vicinity, would exceed the average unit cost of the Rayne Field gas in an amount ranging from 5¢ to 10¢ per Mcf. (R. 1893).

It must be remembered that the aforementioned additional initial costs of acquiring new gas supplies are based solely upon a computation of the costs Texas Eastern would incur in gathering, compressing and transporting such gas to the Rayne Field vicinity. If favored nation triggering, resulting from the acquisition of such new supplies, is also taken into account, it is obvious that such new supplies would exceed the cost of the Rayne Field gas by an amount not less than 25¢ per Mcf. (R. 1893).⁸

4195

C. The advantages which Texas Eastern and its customers realize from the Rayne Field lease acquisition, as distinguished from purchases under gas purchase contracts, are in the public interest.

In addition to the fact that the acquisition of the Rayne Field leases enabled Texas Eastern to avoid favored nation triggering of existing contracts in an amount of approximately \$10,000,000 per year and to acquire one of the most desirable gas reserves in Southern Louisiana at a cost in line with the cost of its existing gas supplies transported to the Rayne Field vicinity and far less than the cost which would be incurred in connecting a comparable new gas sup-

⁸ Mr. Jacobs' testimony shows that the estimated favored nation triggering in the amount of \$10,000,000 per year is the equivalent of approximately 20¢ per Mcf on the estimated annual take from Rayne Field of 51.1 billion cubic feet of gas. (R. 1904).

(4195)

ply, the lease acquisition affords Texas Eastern and its customers other advantages which could not be achieved under the usual type gas purchase contract.

The evidence establishes that the acquisition and complete ownership by Texas Eastern of the Rayne Field reserves, approximating one trillion cubic gas of proved recoverable pipeline gas, will be of great value to Texas Eastern and its customers in the operation of Texas Eastern's system. As has been noted above, since Texas Eastern has acquired the Rayne Field, its takes from the field have varied from 0 Mcf per day to as much as 181,679 Mcf per day. This wide range in deliverability, of course, is of great importance in operating Texas Eastern's pipeline system to meet the demands of its consumers, especially when it is remembered that a great many existing Southern Louisiana gas purchase contracts only allow the pipelines a plus or minus 20% variation in their takes. (R. 1895).

4196

For example, during times of peak sales' demand in the market area, freezing storms are frequently also experienced in the Gulf Coast supply area with the consequence that small fields may be frozen off from the line. Under such circumstances, Texas Eastern is in a position to take large quantities of gas from the Rayne Field, which would not be possible under the restricted take provisions of gas purchase contracts, to offset the loss in supply due to the freezing off of small wells and thus obviate the necessity of curtailing deliveries to the consumers. (R. 1895). Further, as is customary in the Gulf Coast supply area, many of Texas Eastern's contracts contain so-called "take or pay for" provisions which obligate it to either take or pay for a minimum quantity of gas each year whether taken or not. The ability to reduce takes from the Rayne Field during periods of off-peak demand in amounts not possible

under the usual type gas purchase contract has been and will be of great benefit to Texas Eastern in balancing the over-all operation of its pipeline system to avoid or minimize obligations to pay for gas not taken under its gas purchase contracts." (R. 1896). These advantages are greatly en-

4197

hanced by the very large size of the Rayne Field reserve and its ideal location on Texas Eastern's system from an operational standpoint. (R. 1896).

The foregoing and other advantages to a pipeline of owning substantial gas reserves have been recognized by the Commission in the instant case (21 F.P.C. 860) and in *Panhandle Eastern Pipe Line Company, et al.*, Docket Nos. G-1116, et al., 13 F.P.C. 54, 74, wherein the Commission stated.

"Finally, as we see it, the interest of the public definitely lies in the direction of natural-gas production by pipeline systems themselves, as distinguished from their complete dependence for gas supply upon purchases from other producers. There are several reasons why, in our judgment, it is very much in the interest of pipelines, and of the public served by them, that such systems produce themselves a sub-

⁹ Although it is impossible to predict the exact amount Texas Eastern's customers will benefit in dollars by its ability to avoid take or pay for obligations under its gas purchase contracts through its ownership of the Rayne Field leases, it is safe to say that such benefits will be substantial. For example, Transcontinental Gas Pipe Line Corporation estimates that by 1965 it will have paid approximately \$45,000,000 for gas not taken. *Transcontinental Gas Pipe Line Corporation*, Docket No. RP61-13, Tr. 525, 529-31, 563-65. United Gas Pipe Line Company recently disclosed that it has paid approximately \$7,900,000 for gas not taken and that the make up period for much of this gas has expired. *Texas Eastern Transmission Corporation, et al.*, Docket Nos. CP60-122, et al, Tr. 2582-83. Other pipelines are experiencing similar take or pay problems, but, as of this date, Texas Eastern has none.

stantial portion of the natural gas which they transport and sell. In the first place, such production strengthens their bargaining position in negotiating gas purchase contracts with independent producers. While this record does not contain the data which would be necessary to permit specific comparisons on this score, we are convinced that companies not wholly dependent upon arm's length purchases for their entire supplies are generally able to buy gas more advantageously. This advantage must ultimately redound to the benefit of their customers through lower gas-purchase prices and cost of service than would otherwise obtain. Secondly, by utilizing their own production to take the swings of pipeline—throughout in response to seasonal and other fluctuations of consumer demand, such pipeline systems are able to take their purchased gas at relatively uniform volumes and high load factors which, under the usual provisions of gas-purchase contracts having minimum take clauses, likewise ordinarily results in lower purchased-gas and service costs, with concomitant rate advantages to their customers. And thirdly, it seems too obvious to require demonstration that it is much more in the interest of consumers in interstate markets remote from the major areas of natural-gas production that the pipeline serving them continue to control supplies ade-

4198

quate to give them service reasonably adequate to meet their needs, than that low rates be available to them on paper or in theory without the gas supply being actually present for purchase by them thereunder."

7

Texas Eastern excepts to the Examiner's failure to find that the public convenience and necessity requires that

service from the Rayne Field facilities be continued in the future as it has in the past.

In Paragraph (A)(4) of its order issued July 14, 1961, the Commission set forth the following issue.

"If Texas Eastern's lease acquisition is not in the public interest by reason of the cost of the Rayne Field gas, whether Texas Eastern should be ordered to cease and desist from operating the 'Rayne Field facilities' or as a possible alternative, whether Texas Eastern will agree that in future determinations of the justness and reasonableness of its rates under Sections 4 and 5 of the Natural Gas Act it will not claim actual costs associated with Rayne Field gas if the reasonable area price is lower than actual cost."

For the reasons set forth above, Texas Eastern's acquisition of the Rayne Field leases is clearly in the public interest. Particularly when viewed in the light of the peculiar facts and circumstances which existed on Texas Eastern's system at the time of the Rayne Field lease acquisition, it is crystal clear that the lease purchase represented the most reasonable and prudent manner in which Texas Eastern could obtain urgently needed additional gas supplies at the lowest possible cost to its customers while holding the line on the cost of its existing gas supplies by the avoidance of favored nation triggering in the possible amount of approximately \$10,000,000 per annum.

4199

In view of the fact that the public interest obviously requires continuation of service from the Rayne Field, no decision is necessary upon the Commission's alternative issue of "whether Texas Eastern will agree that in future determinations of the justness and reasonableness of its rates under Sections 4 and 5 of the Natural Gas Act it will

(4199)

not claim actual costs associated with Rayne Field gas if the reasonable area price is lower than actual cost." However, Texas Eastern wishes to make it clear that it would be unwilling to play such a game of "heads you win, tails I lose."

In the first place the uncontradicted substantial evidence conclusively establishes that the Rayne Field lease acquisition was a reasonable and prudent investment on the part of Texas Eastern's management in the best interests of its customers. Accordingly there could be no legal justification for depriving Texas Eastern of any portion of its actual reasonable and prudent costs associated with Rayne Field gas in future terminations of its rates.

Secondly, the Rayne Field leases were acquired in good faith on July 27, 1959, approximately 14 months prior to the promulgation of the first of the Commission's area price orders.¹⁰ Any condition now imposed upon Texas Eastern limiting it to *the lesser* of its actual costs associated with Rayne or the reasonable area price would clearly be confiscatory.

Finally, and of equal importance, this proceeding deals with the

4200

cost of pipeline-produced gas to the customers, including all costs of developing, gathering, compressing and delivering the gas at high pressures over the life of the leases. The Commission's area price orders, on the other hand, relate only to initial prices to be received by independent producers and have no relation whatsoever to the costs pipelines may claim for their own company-produced gas. Moreover, since area prices do not include additional costs

¹⁰ The Commission's Statement of General Policy No. 61-1 was issued September 28, 1960.

incurred by the pipelines and borne by the consumers for compression, gathering, treating, transportation, prepayments, take or pay, etc., they are in no way comparable to the estimates of record in this proceeding concerning the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field which include such additional costs. In fact, the only cost estimates of record herein which are in any way comparable to area prices are those estimates confined to the average unit price paid by Texas Eastern to the sellers of the Rayne Field leases, ranging from 16.9¢ per Mcf Ex. X-4) to 17.49¢ per Mcf (R. 1355) at 15.025 psia. It is undisputed that such prices are far below "in line" or area prices.

FINDINGS AND CONCLUSIONS REQUESTED BY TEXAS EASTERN

In addition to the findings and conclusions set forth in the Commission's order issued herein on June 23, 1959, Texas Eastern proposes the following findings and conclusions in lieu of the findings and conclusions in the Examiner's decision:

- (1) The evidence introduced by Texas Eastern at the reopened pro-

4201

ceeding establishes that the acquisition costs of the Rayne Field leases are and will be consistent with the public convenience and necessity.

- (2) Texas Eastern's estimates that the Rayne Field leases cover an original proved recoverable gas reserve of approximately 988,771,000 Mcf of pipeline gas appear to be proper and reasonable. Upon the basis of these estimates the Commission finds that the consideration paid and to be paid for the Rayne Field leases will result in an average unit price of approximately 17.49¢ per Mcf at 15.025 psia for the working interest gas owned by the

sellers of the leases. If credit is given for the value of the separator liquids Texas Eastern is entitled to receive from the gas, the unit price paid for the working interest in the leases is approximately 16.9¢ per Mcf at 15.025 psia after all estimated costs of developing, operating, gathering and delivering the gas over the life of the production. These estimated unit prices are substantially less than uncontested permanently certificated initial gas purchase contract prices prevailing in the area at the time of Texas Eastern's acquisition of the Rayne Field leases.

(3) The substantial evidence introduced at the reopened proceedings herein establishes that the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is not out of line. Although it is impossible to precisely predict the exact cost of producing the Rayne Field gas over the life of the leases, the cost estimates presented by Texas Eastern are reasonable and establish that the cost of the Rayne Field gas is "in line" with the cost of making other large blocks of gas connected to Texas Eastern's system at the time of the Rayne Field lease acquisition

4202

available in the vicinity of the Rayne Field. It also established that the estimated cost of the Rayne Field gas to Texas Eastern and its customers is less than the cost which would be incurred in making any comparable gas supply available in the vicinity of the Rayne Field at "in line" field prices prevailing in the area at the time of the Rayne Field lease acquisition.

(4) The evidence further establishes that the acquisition of the Rayne Field leases was in the public interest even if the cost of the gas to Texas Eastern and its customers should prove to be out of line. Due to the peculiar facts and circumstances existing on Texas Eastern's sys-

tem at the time of the Rayne Field lease acquisition, the lease purchase represented the most reasonable and prudent manner in which Texas Eastern's management could obtain additional gas supplies to meet the requirements of its customers without triggering favored nation clauses under Texas Eastern's existing gas purchase contracts in an estimated amount of approximately \$10,000,000 per annum. In addition to contributing to the continuation of a stable gas purchase price structure on Texas Eastern's system without additional costs to its customers, the Rayne Field lease acquisition also benefited Texas Eastern's customers by providing increased flexibility in Texas Eastern's operations, thus enabling it to better serve its customers' requirements and at the same time reduce the possibility of incurring take or pay obligations under its gas purchase contracts.

(5) The Rayne Field leases have been connected to Texas Eastern's system for over 3 years. Actual operations during this period have demon-

4203

strated that the lease acquisition had no disruptive effect on area prices by triggering favored nation or price redetermination clauses in Texas Eastern's or any other pipeline company's contracts. On the contrary, Texas Eastern's acquisition and operation of the Rayne Field leases has enabled it to "hold the line" on cost of its gas supplies and to maintain stability in its rates and services to its customers.

(6) Disconnection of the Rayne Field from Texas Eastern's system would seriously impair its ability to maintain adequate service to its customers and the public convenience and necessity requires that service be continued from the Rayne Field in the future as it has in the past.

(4203)

(7) The construction and operation by Texas Eastern of the facilities and the rendition of the sales referred to in the Commission's order issued herein on June 23, 1959, is required by the public convenience and the certificate of public convenience and necessity therefor heretofore issued by the Commission's order herein of June 23, 1959, should be reissued in its entirety.

FORM OF ORDER REQUESTED BY TEXAS EASTERN

Texas Eastern proposes the following form of order in lieu of the order proposed by the Presiding Examiner:

(A) The certificate of public convenience and necessity heretofore issued to Texas Eastern Transmission Corporation by the Commission's order herein of June 23, 1959, is hereby reissued in its entirety.

4204

Motion for Oral Argument

For reasons set forth hereinabove, Texas Eastern respectfully requests the Commission to schedule oral argument on the matters involved in this proceeding, and that Texas Eastern be granted the opportunity to present oral argument before the Commission in support of the foregoing exceptions.

Respectfully submitted,

TEXAS EASTERN TRANSMISSION CORPORATION

By W. D. DEAKINS, JR.

W. D. Deakins, Jr.

Its Attorney

Of Counsel:

JACK D. HEAD, General Counsel

Texas Eastern Transmission Corporation

P. O. Box 2521

Houston 1, Texas

KEITH M. PYBURN, Esquire

Texas Eastern Transmission Corporation

Suite 852, Pennsylvania Building

Washington 4, D. C.

JOSEPH F. WEILER, Esquire

Texas Eastern Transmission Corporation

P. O. Box 2521

Houston 1, Texas

MR. MARTIN L. FRIEDMAN

Chapman, Wolfsohn & Friedman

932 Pennsylvania Building

Washington 4, D. C.

BEFORE THE FEDERAL POWER COMMISSION

Docket Numbers

Texas Eastern Transmission Corporation	G-12446
	and G-12447
Continental Oil Company	G-12432

**Exceptions of Commission Staff to Initial Decision of the
Presiding Examiner**

Now comes Commission Staff Counsel, pursuant to Section 1.31 of the Commission's Rules of Practice and Procedure, and submits the following exceptions to the Presiding Examiner's decision issued June 29, 1962, in the above-entitled proceeding.¹

I

INTRODUCTORY STATEMENT

There have now been issued examiners' initial decisions in two proceedings involving so-called developed leasehold acquisitions by pipelines. The first decision was issued January 8, 1962, in *Tennessee Gas*

4220

Transmission Company et al. (MCN), Docket Nos. G-14562, *et al.*² The second decision, Rayne Field, is the

¹ The time for filing exceptions was extended by Commission Notices of July 16, 1962, and August 30, 1962, upon motions made by Texas Eastern Transmission Corporation.

² Subsequent to the issuance of the MCN decision, the Commission accepted the applicants' amended filings to their respective applications, materially changing the manner in which the gas was proposed to be acquired from the producers. This obviated the necessity of having the Commission pass upon the matters disposed of by the examiner in that decision and the applications as amended were set for rehearing.

subject of these exceptions. The staff's position in the latter case is identical with its position in the former perforce the vinculum created by the contractual characteristics common to both.³

In the initial decision issued in MCN the Presiding Examiner set forth a precise and analytical justification for his assertion of Commission jurisdiction over the so-called leasehold acquisition, beginning with satisfactory perorations as to the inherent hazards to the consumer in this type of gas purchase by a pipeline, and closing with ameliorating findings and conclusions. In the Rayne Field decision, to which these exceptions are directed, the Presiding Examiner, although citing the very evils recognized by the examiner in MCN, takes an aberrant course in failing to assert Commission jurisdiction over the so-called leasehold acquisition and by so doing fosters the very situation that is decried. These exceptions, however, are not intended primarily as a criticism of.

4221

the examiner's rationale in Rayne Field for until and unless specific guideposts are laid down, conflicting results are almost inevitable. The difficulty of the decision lies mainly in its tendency to either avoid or neglect formidable arguments on the jurisdictional issue raised by staff. Consequently, and with the further knowledge that resolution of the jurisdictional issue requires a thorough understanding of the contractual terms and their effects on payments and production, as fully discussed in staff's initial brief, the staff respectfully moves that its initial brief in this proceeding, filed with the examiner and served on all parties of record March 22, 1962, be incorporated in these

³ Compare staff's brief in the instant matters with its initial brief filed August 7, 1961, in MCN. The same staff counsel has represented the Commission in both proceedings.

(4221)

exceptions by reference.⁴ To do otherwise would require a complete restatement here of those matters set forth in some 70-odd pages of initial briefing. Specific reference will be made to sections of said brief in connection with the following enumerated exceptions.

II

EXCEPTIONS

1.

This Rayne Field decision relates to the rehearing had on the matters presented in the captioned docketed applications after the case had

4222

previously been decided by the Commission but upon appeal was remanded by the Court of Appeals for the District of Columbia. The major maelstrom here swirls over (1) whether or not the Commission has jurisdiction over the so-called leasehold acquisition and conjunctively (2) whether this issue can rightfully be raised in the remanded proceeding. We shall here discuss the later point, the jurisdictional issue being the subject of our second enumerated exceptions.

The applicants have argued that the jurisdictional issue was decided in the negative by the Commission and the Court of Appeals and therefore cannot now be raised in the remanded proceeding. It is significant, however, that the examiner, although stating that the Court of Appeals "• • • held the acquisition of the leasehold interest in gas reserves was beyond the jurisdiction of the Commission • • •",⁵ to which the staff takes exception, nevertheless

⁴ A copy of staff's initial brief is appended to the copies of these exceptions being filed with the Commission.

⁵ Examiner's decision, p. 6.

devotes a considerable portion of his decision to a discussion of the jurisdictional issue. It would thus appear that staff's argument in its initial brief under the caption (a) *Raising the Jurisdictional Question* was sufficient to overcome applicants' contentions of *res adjudicata*.

Since the examiner cites no support in his decision for his examination of the jurisdictional issue, and in contemplation of the applicants

4223

taking exception to such reexamination, we here refer, for the Commission's guidance in support of such action, to pages 11 through 16 of staff's initial brief. Additionally, there is embodied therein staff's contra position to the examiner's aforequoted statement.

2.

As previously indicated, the examiner has declined to assert Commission jurisdiction over the so-called leasehold acquisition:

In applying the principles of *Panhandle* and *Phillips* opinions, *supra*, to the evidence of record in this hearing, it is concluded the Commission was without jurisdiction over the Rayne Field lease and leasehold acquisition and the natural gas under said lease and leaseholds by Texas Eastern until (1) the gas was connected to an interstate system of pipelines or (2) the gas was dedicated to a sale in interstate commerce.

This surprising conclusion, to which the staff takes exception, is an idealistic contradiction of the reality for, assuming the foregoing logic to be supported by the cases

⁶ Examiner's decision, p. 9.

(4223)

cited, one must bottom the rationale on the inculcating asseverations of the applicants that there is here involved a *leasehold acquisition*. The examiner summarily determines this to be the case without making any disposition, nay, not even mention, of staff's contention that what is actually involved is in fact a *purchase of gas*.

4224

The examiner, further, cites *Panhandle* above but again does not dispose of staff's argument differentiating *Panhandle* from the matters presented in these docketed applications.

Finally, in evolving a determination that the Commission lacks jurisdiction over the so-called leasehold acquisition, the examiner perfunctorily footnotes a reference to the MCN decision with nary an attempt to dispute or discredit the analysis contained in that decision and relied upon by the staff in assertion of Commission jurisdiction over this type of gas purchase.

In consequence thereof, and in support of its exceptions and its affirmance of Commission jurisdiction, the staff reasserts its position set forth in its initial brief by making specific reference to pages 16 through 24 of said brief under the captions (b) *Jurisdiction as per the Facts of This Transaction*, (c) *Jurisdiction by Differentiation from the Panhandle Case* and (d) *Jurisdiction as per the Rationale in the MCN Decision*.

3.

Lastly, in recognition of the probable adverse impact this type of gas acquisition will have on Texas Eastern's consumers, the examiner attaches a condition to the certification which is naught but a chimerical palladium.

4225

Although the examiner does not assert Commission jurisdiction over the so-called leasehold acquisition, he nevertheless attempts to afford the consumer a much needed measure of protection by the following findings embodied within the decision culminating in the attachment of a specific condition to his certification of the subject applications:

Because the Commission did not have jurisdiction over the acquisition of these Rayne Field leases and the natural gas thereunder presents no legal barrier to the Commission's jurisdiction over the purchaser of the gas. * * * *

* * * It appears virtually impossible, from the record, to determine the future costs to Texas Eastern for the Rayne Field since they are predicated upon assumptions and estimates. * * * *

* * * Combining the costs pertaining solely to the Rayne Field gas with the costs of the remainder of the gas supply available to Texas Eastern means "rolling in" gas costs which may be appreciably greater than the average cost of Texas Eastern's gas supply existing immediately prior to Texas Eastern's acquisition of the Rayne Field gas and leases.⁹

After determining that the initial price to be charged by Texas Eastern for the sale of Rayne Field gas to Texas

⁷ Examiner's decision, p. 10.

⁸ Examiner's decision, p. 12.

⁹ Examiner's decision, p. 17.

(4225)

Eastern shall be the "in line" price as of 1957, the year when these contracts were entered into, said

4226

price being found to be 18.5¢ per Mcf¹⁰ with which the staff concurs, the examiner concludes:

- (6) It is further necessary and appropriate in the administration of the Natural Gas Act that Texas Eastern maintain at all times, during the period the Rayne Field gas is available to it, complete and separate records to accurately reflect the total costs for producing the Rayne Field gas all as more fully detailed and directed hereinabove.¹¹

The staff submits that the above-cited condition is but a temporary expedient which does not have the efficacy to promote the objective that it seeks. There is nothing contained therein to prevent Texas Eastern from rolling in Rayne Field cost with all of its other company-owned production costs in future rate proceedings. Specific reference is made to pages 24 through 60 of staff's initial brief wherein is set forth a complete discussion of Rayne Field costs. The affect and inequities arising out of a certification such as that proposed by the examiner or alternative conditioned certificates are set forth on pages 61 through 70 of said initial brief.

In conclusion the staff respectfully submits that on the basis of the record made in this proceeding and the pertinent findings of the examiner the only equitable solution to the disposition of these

¹⁰ Examiner's decision, p. 16.

¹¹ Examiner's decision, p. 19.

4227

applications which would safeguard Texas Eastern's consumers requires à la MCN:

1. Assertion of Commission jurisdiction over the so-called leasehold acquisition.
2. Finding that this type of gas purchase in the case at bar is not in the public interest.
3. Denial of the applications here with the provision however that the producer applicants, within a specified time, may file for reinstatement their 1957 contracts with Texas Eastern, which provide for the sale of Rayne Field gas to the latter on a per Mcf basis.
4. Acceptance of those reinstated filings and, subject to any petition in opposition, summarily grant to the producer-applicants certificates conditioned on an initial price of 18.5¢ per Mcf. The application of Texas Eastern to construct facilities to attach the gas would likewise be granted.

Respectfully submitted,

GEORGE P. LEWNES
George P. Lewnes
Commission Staff Counsel

Washington, D. C.
September 14, 1962

(4317)

4317

(Docketed Feb. 6, 1963)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 378

Docket Nos.

TEXAS EASTERN TRANSMISSION
CORPORATION

G-12446, G-12447

CONTINENTAL OIL COMPANY

G-12432

**Opinion and Order on Application for Certificate Determining
Jurisdiction, Deferring Decision and Requiring Further
Filings**

Issued: February 6, 1963

4318

APPEARANCES

For the Brooklyn Union Gas Company

Edwin F. Russell

Harry G. Hill, Jr.

Brooklyn, New York

For New York Public Service Commission

Barbara M. Suchow

New York, New York

Kent H. Brown

Charles J. Cox

Albany, New York

For New Jersey Natural Gas Co.

Sidney M. Schreiber

Newark, New Jersey

For the United Gas Improvement Co.

J. David Mann, Jr.
John E. Holtzinger, Jr.
J. Frederick Moring
Washington, D. C.

For Long Island Lighting Co.

David K. Kadane
E. M. Barrett
Bernard Hulkower
Mineola, New York

4319

For Pennsylvania Public Utility Commission

Alan R. Squires
Hubert E. Squires
Harrisburg, Pennsylvania

*For the Ohio Fuel Gas Company and the
Manufacturers Light and Heat Company*

Frederick H. Clark
Brooks E. Smith
William C. Hart
R. A. Rosan
New York, New York

For Public Electric and Gas Company

J. Harry Mulhern
Edward S. Kirby
Fred M. Broadfoot
James R. Lacey
Newark, New Jersey
William R. Duff
Washington, D. C.

For the Staff of the Federal Power Commission

George P. Lewnes
Washington, D. C.

SWIDLER, Chairman:

These proceedings relate to the supply of gas from the Rayne Field in Louisiana to Texas Eastern Transmission Corporation and arose from applications filed by Texas Eastern and Continental Oil Company for certificates of public convenience and necessity under Section 7 of the Natural Gas Act. The proceedings are before us after remand of a prior order by the Court of Appeals,¹ further hearings, a decision of the presiding examiner issued June 29, 1962, and exceptions by several of the parties. The case was argued orally on November 29, 1962.

The proceedings are the subject of an involved history. Texas Eastern, which is a natural-gas company owning and operating an interstate natural gas transmission system extending from Texas to the Philadelphia-Newark area, executed gas purchase contracts on February 1, 1957, with Continental, M. H. Marr, Sun Oil Company and General Crude Oil Company to purchase their natural gas production in the Rayne Field in Acadia Parish, at an initial price of 23.9 cents per Mcf including state taxes of 1.3 cents per Mcf. On April 22, 1957, Texas Eastern filed its application seeking a certificate authorizing it to construct and operate a 2200 horsepower compressor station and 22 miles of 14-inch pipeline to transport natural gas from the Rayne Field to Opelousas, Louisiana, where the gas was to be delivered into its pipeline system. At about the same time certificate applications were filed by Continental and the other producers. After a hearing the examiner issued a decision granting unconditioned certificates of public convenience and necessity, and exceptions were filed.

¹ *P.S.C. of N.Y. v. F.P.C.*, 287 F. 2d 143 (CADO).

4321

Before the Commission had acted on the exceptions the Court of Appeals in *P.S.C. v. F.P.C.*, 257 F. 2d 717 (CA3)² reversed an order of the Commission granting unconditioned certificates for sales of natural gas from off-shore Louisiana at 22.4 cents per Mcf on the ground that the price had not been justified. Thereafter the producers in the present proceeding requested withdrawal of their applications for sales at a somewhat higher initial rate and Texas Eastern filed a petition to reopen the hearing and to amend its application to reflect a change in its plan for acquiring the Rayne Field gas.

Under the new plan the facilities to be built by Texas Eastern would be essentially the same as under the previous plan and the same volumes of gas would be flowing into its system. The difference is solely in the contractual arrangements. Texas Eastern would acquire the leasehold interests in the reserves which the producers had formerly committed to the gas purchase contracts with Texas Eastern. To carry out the plan the four Rayne Field producers, Continental, Sun, Marr and General Crude entered into a contract designated "Lease Sale Agreement" dated December 4, 1958, with Louisiana Gas Corporation, an affiliate of Texas Eastern. Since by a simultaneous contract Texas Eastern was to have the right to acquire the title to the leases from Louisiana Gas, we shall refer to Texas Eastern as the real party in interest. Under the Lease Sale Agreement, and attached assignment Texas Eastern was to make an initial cash payment of \$12,420,500 and a payment of 16 annual promissory notes amounting to \$121,975,200, altogether totalling \$134,395,700. On their part the four producers would convey to Texas Eastern

² Affirmed as *Atlantic Refining Co. v. P.S.C.*, 360 U.S. 378, the *CATCO* case.

(4321)

all gas rights, wells and related equipment down to the base of what is called the Nodosaria A Sand.³ The producers would reserve their interest in oil and other minerals and a production payment covering all the liquids to be extracted from the gas. The Agreement is subject to certain conditions precedent including a tax ruling in favor of the producers that the sale of the leasehold interests would be considered a long-term capital gain and the issuance of a certificate of public convenience and necessity to Texas Eastern that would enable it to take and transport the gas.

While there is controversy in the briefs in the present stage of the proceeding over the extent of the Rayne Field reserves, they are known to be of substantial size. Texas Eastern estimates production to be 924,678 Mmcf in the years 1961 through 1989. Based on total recoverable reserves of 990,000 Mmcf Texas Eastern acquired approximately 79 percent under the original leasehold acquisition transaction in 1958. Since that time Texas Eastern has acquired the interests of minority leaseholders bringing its total percentage interest in the Rayne Field reserves up to

4322

approximately 81.5 percent. As to the remaining gas, mostly royalty gas, Texas Eastern pays for it on the basis of 22.6 cents per Mcf including the Louisiana severance tax of 2.3 cents per Mcf.

Texas Eastern's request for reopening the proceeding to take into account its lease purchase plan was granted, and on June 23, 1959, the Commission in Opinion No. 322, 21 FPC 860, issued an unconditioned certificate to Texas Eastern for its proposed facilities. In its opinion the Commission discussed the lease sale arrangement, and held that the record in the case amply supported the conclusion that

³ The base is at 13,650 to 13,890 feet.

the elements of public convenience and necessity were satisfied by Texas Eastern's project without examining the cost to Texas Eastern of the Rayne Field leases. It noted "Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate" (21 FPC at p. 864).

In its decision of December 8, 1960, the reviewing court⁴ noted that the language and tenor of the Commission's opinion appeared to confer general approval upon the terms of the acquisition arrangement and to this extent was unsupported by substantial evidence. The court thought it of "no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, beyond the regulatory control of the Commission". The court indicated that the Commission could regulate the purchaser regardless of the status of the seller and added:

Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant. See *Kansas Pipe Line and Gas Co., et al.*, supra note 4. Or it may reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity.

As a result of the remand the Commission issued an order on July 14, 1961, 26 FPC 167, in which it found that the first course enumerated by the court would leave unsettled matters of public importance and would provide inadequate protection to the public. It thereupon reopened the proceedings for the purpose of determining:

⁴ *P.S.C. v. F.P.C.*, 287 F. 2d 143 (CA DC).

(1) Whether the public convenience and necessity require that the certificate issued in these proceedings by our order of June 23, 1959, and set aside by the Court of Appeals, be reissued in whole or in part;

4323

and also whether the cost of the Rayne Field gas was out of line, whether the proposal was in the public interest even if the cost was out of line, and whether Texas Eastern should cease operating the Rayne Field facilities or exclude them from its costs.

Hearings were held in October, November and December of 1961, and the examiner issued his decision June 29, 1962. The examiner was of the opinion that the Commission was without jurisdiction over the Rayne Field lease and leasehold acquisition and the natural gas thereunder until the gas was connected to an interstate pipeline or was dedicated to interstate commerce, but that the Commission could regulate the purchase of the gas, Texas Eastern, and determine at what price the public convenience and necessity required dedication. After considering the evidence he concluded that it was virtually impossible to determine the future costs to Texas Eastern for the Rayne Field service since they were predicated upon assumptions and estimates. He therefore turned to a consideration of the in-line price as of April 22, 1957, when, he said, the gas was dedicated to the interstate market. He found that the initial price allowed to Texas Eastern for the Rayne Field gas in interstate commerce should be conditioned at 18.5 cents per Mcf, exclusive of taxes, at 15.025 psia, and issued a certificate to Texas Eastern so conditioned. He also required that the company keep separate accounts for the Rayne Field costs, so that the costs of this gas could be identified in any future rate proceedings.

Exceptions to the decision were filed by Texas Eastern, The United Gas Improvement Company (UGI), Philadelphia Electric Company and our staff.

The issues which emerge from the record in this proceeding, are whether we have jurisdiction over the lease sale arrangement, whether the arrangement is required by the public convenience and necessity, and what is the appropriate disposition to be made at this stage in the proceedings.

JURISDICTION

In determining whether to grant a certificate to Texas Eastern the cost of its gas supply is of obvious importance. If at the time we are considering a pipeline's application for a certificate we have before us the applications of producers to sell gas to the pipeline we can, of course, consider the producers' proposed initial price and can condition their certificates appropriately. In the present case Texas Eastern contends, and the examiner agrees, that we do not have jurisdiction over the acquisition of the gas supply because what was to be a sale of gas has been converted into a sale of leases, and we are left, it is said, only with the jurisdiction to disallow a portion of Texas Eastern's cost of its gas supply. We do not agree that there is such a gap in our jurisdiction under the Natural Gas Act. As will be developed below, our jurisdiction, under the circumstances of this case, extends to the sale of gas to Texas Eastern whether technically in the form of leasehold transaction or otherwise.

4324

Before going into the question of jurisdiction we may note that Texas Eastern argues that this question has been settled and is not before us. Texas Eastern disagrees with the conclusion of the staff and the interveners that the Commission is free to re-examine the jurisdictional ques-

tion related to the so-called Rayne Field lease acquisition. On our part we agree with the conclusions of the interveners and the staff.

In our previous opinion the Commission merely noted without discussion that we had no authority to issue a certificate for the acquisition of the leases (21 FPC at p. 864). The court, again without discussion, noted that the "commission has been held to lack jurisdiction over gas leases" citing *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. It is apparent the issue was hardly considered in the earlier phase of this proceeding; in our opinion, it may be considered at this stage if for no other reason than that the issue was given but passing mention by the Commission and the Court. In *N.L.R.B. v. Baltimore Transit Co.*, 140 F. 2d 51, 55 (CA4), certiorari denied 321 U.S. 795; it was said that "An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past."

In *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, an order of the Federal Communications Commission denying an application for a radio station license was reversed because the Commission had misunderstood state law. Upon remand the F.C.C. set argument on the application with two rival applications that had been filed and heard subsequently. Upon the objection of Pottsville and review of this procedural issue the Supreme Court held that when the Court of Appeals had laid bare the error with respect to state law, the Commission was not limited to correcting this error but "was again charged with the duty of judging the application in the light of 'public convenience, interest or necessity'" (309 U.S. at p. 145). One of the critical public convenience and necessity issues which became available for reconsideration by this Commission when its earlier decision was reversed and remanded for "further

proceedings not inconsistent" with the Court of Appeals opinion, was the underlying question of its jurisdiction over the lease acquisition.

Texas Eastern also contends that apart from what we could have done on remand, we failed to specify the jurisdictional issue in reopening the proceeding. In our order of July 14, 1961, (26 FPC 167) we reopened the record to permit Texas Eastern, in the words of the Court of Appeals, "to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity". We then added:

"It is also necessary and reasonable that we define, *but not necessarily limit*, the issues and prescribe procedures, as hereinafter ordered, so as to guide the course of this reopened proceeding." [underlying added]

4325

We thereupon listed some of these issues including the issue, as quoted earlier in this opinion, "Whether the public convenience and necessity require that the certificate—be reissued in whole or in part." By the wording of this order we were not necessarily providing for a further hearing with respect to all issues. The issue of our jurisdiction is fundamental and could not be waived,⁵ but in any event the jurisdictional issue is comprehended in the issue whether the public convenience and necessity require that the certificate be reissued. The jurisdiction issue was raised and briefed before the examiner, and was briefed and argued before the Commission.

In considering the question of the Commission's jurisdiction over the in-place sale of the Rayne Field gas to Texas Eastern, it must be kept in mind that the original

⁵ Compare *United States v. Corrick*, 298 U.S. 435, 440; *Mitchell v. Maurer*, 293 U.S. 237, 244.

sales contract between the producers and Texas Eastern was clearly subject to FPC jurisdiction and not subject to state regulation. The changes made in the terms of the agreement would not appear to confer state jurisdiction over this interstate transaction. In such a situation, the Supreme Court has stated that it is "not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. Compare *Guss v. Utah Labor Board*, 353 U.S. 1 * * *. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practically regulate a given area and if we find that it cannot, then we are impelled to decide that federal authority governs."⁶ Congress "meant to enact a comprehensive and effective regulatory scheme",⁷ . . . "to protect consumers against exploitation at the hands of natural gas companies."⁸

We have jurisdiction over this transaction because by it the producers transferred natural gas to Texas Eastern for resale by Texas Eastern in the interstate market. The fact that the gas, which had been developed to an extent where reasonable estimates could be made as to the available reserves was sold in bulk rather than on a per Mcf basis does not change the nature of the sale. Although in form a lease transfer, we agree with the staff that we should look beyond the label of the transaction to its essence.⁹ The contract provides for a downpayment and 16 annual promissory notes in return for the transfer of leasehold rights plus equipment, but the effect resembles

⁶ *Transcontinental Gas Pipe Line Corp. v. F.P.C.*, 365 U.S. 1, 19-20.

⁷ *Panhandle Eastern Pipe Line Company v. F.P.C.*, 332 U.S. 507, 520.

⁸ *Sunray Mid-Continent Oil Company v. F.P.C.*, 364 U.S. 137, 147.

⁹ Of course, we are not concerned with the transfer of other property rights, if they are involved. Nor are we concerned with the operation of the producing properties, wells or the equipment for producing and gathering natural gas.

the ordinary sale of gas because of the following features among others:

4326

(1) Only gas in particular strata is conveyed; and the producers retain their interest in oil and other minerals;

(2) In effect the transaction is for the sale of stripped gas inasmuch as the producers are to receive a production payment from Texas Eastern from the sale of natural gas liquids;

(3) While the payment for the leases is represented by notes and spread over a 16-year period, the notes have an acceleration clause by which payment is accelerated if production is increased, so that Texas Eastern's payments would be geared to production;

(4) By a management agreement dated July 27, 1959, Continental agrees to operate the field, including drilling wells and managing all wells and equipment, and to deliver to Texas Eastern specified minimum daily quantities of gas; Texas Eastern will reimburse Continental for its expenses in operating the field but the assignment of the leases shows that the costs of operating the leases will be defrayed out of the production payments to which Continental is entitled;

(5) It is Louisiana Gas, not Texas Eastern which is liable on the notes to the producers, so that the true purchaser of the gas not bound by the principal obligation of the lease sale transaction.

In opposition to the claim of jurisdiction Texas Eastern cites *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, which is also cited by the Court of Appeals in the present proceeding. In that case Panhandle transferred substantial gas leases to a subsidiary, Hugoton Production Company, which was to sell the gas in intrastate commerce, and subsequently spun off the Hugoton stock to the Pan-

handle stockholders. The Court held that the Commission did not have jurisdiction over the transaction and denied it an injunction to prevent the transfer. Quoting from Section 1(b) of the Act which excludes from our jurisdiction "the production or gathering of natural gas" the Court concluded that "leases are an essential part of production" (337 U.S. at p. 505), that Congress "excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas," (337 U.S. at p. 507) and that "the transfer of undeveloped gas leases" was "an activity related to the production and gathering of natural gas and beyond the coverage of the Act" (337 U.S. at 515).

We think that the present case is distinguishable from that involved in the *Panhandle* case. In that case the leases were undeveloped so that the transfer did not resemble a sale of gas as did the sale of developed leaseholds here. Furthermore, the reserves here are connected or are to be connected to an interstate pipeline and are to be sold in interstate

4327

commerce while those in *Panhandle* were transferred to a corporation which subsequently sold them in intrastate commerce. Also, in the *Panhandle* case the gas reserves passed entirely out of the control of the seller while here the seller retained rights to oil, gas if found other than in particular strata, production payments for liquids, and management of the field.

Apart from these distinctions, which we think controlling in themselves, the *Panhandle* case was decided in 1949, five years before the Supreme Court held in the *Phillips* case¹⁰

¹⁰ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672. It may be noted that the court in *City of Detroit v. F.P.C.*, 230 F. 2d 810 (CA DC), certiorari denied 352 U.S. 829, pointed out the influence of the *Phillips* case on the procurement of gas supplies.

that sales of natural gas by producers in interstate commerce were subject to our jurisdiction. In the *Phillips* case the Court found that sales from producers to pipelines occurred after production and gathering as those terms are used in Section 1(b) of the Act had been completed. However, the Court did not rest its decision on this narrow ground but said that it was the "congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company." The instant transaction obviously falls within this category aside from any question as to the applicability of *Panhandle* to the transfer of gas leases to intrastate purchasers.

The *Phillips* case has been followed in numerous cases, including *Saturn Oil & Gas Co. v. F.P.C.*, 250 F. 2d 61, 68 (CA10), certiorari denied 355 U.S. 956, and *Continental Oil Co. v. F.P.C.*, 266 F. 2d 208, 210 (CA5), certiorari denied, 361 U.S. 827, which are of particular interest here. In the *Saturn* case the sales were made at the wellhead. The Court considered that they were made after production but prior to gathering and interpreted the *Phillips* case to hold "that the production or gathering exemption of section 1(b) did not apply to exclude from the jurisdiction of the Commission sales by any producer of natural gas for transportation interstate for resale to the public." In the *Continental* case the sale was made at the top of two valves in the "Christmas Tree" at the wellhead. The Court concluded that "production" was complete before the point of sale, but it is obvious that "gathering" had not been completed.

Thus we conclude that a sale of gas in interstate commerce during the course of production and gathering is subject to our jurisdiction. Likewise, the sale of gas (or

(4327)

reserves) made under the circumstances here involved by the producers to Texas Eastern for transportation in its pipeline is a sale of gas for resale in interstate commerce and is subject to our

4328

jurisdiction. Any other result would exalt form over substance, would give greater weight to the technicalities of contract draftsmanship than to the achievement of the purposes of the Natural Gas Act, and would impair our ability to control the price received for gas sold to the pipelines in interstate commerce to the detriment of the ultimate consumer. Control limited to approving the costs of the gas to the purchasing pipeline is, of course, not an effective way to regulate producer prices because in the large a pipeline must be allowed to pass on its purchased gas costs to the ultimate consumer or it cannot continue to discharge its public service responsibilities.

THE LEASE SALE

In view of our findings that the in-place sale of the Rayne Field gas reserves to Texas Eastern is subject to our jurisdiction, it is obvious that the proceeding is not in a posture for final disposition at this time. It will now be necessary for the producers to file an application for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act to obtain Commission approval of the sale of this gas.

It is clear from the record of this case that it is not in the public interest for this Commission to certificate a transaction such as the one presented to us on this record. Having asserted our jurisdiction, the price that the producers will receive under the proposed lease sale arrangements must be subject to the Commission's authority to fix just and reasonable rates. However, the terms of the instant arrangements which contemplate that Texas East-

ern would pay the producers a sum of money in cash and then make payments on promissory notes over a 16-year period certainly did not envision adjustments from time to time to comply with FPC rate regulation and it is indeed difficult to envision how we could exercise our regulatory authority within the framework of such an arrangement.

Another consideration which is of importance in determining the type of arrangements for sales by producers to pipelines is the fact that the Commission is now implementing the area approach to producer regulation. Sales under the arrangements herein contemplated could not readily be adjusted to our determination of just and reasonable rates in an area rate proceeding and they would thus escape effective rate regulation.

The record in this proceeding clearly demonstrates the difficulty of attempting to determine a proper price for this gas under the present arrangements. Evidence on average costs per Mcf was presented by Texas Eastern on various assumptions ranging from a low of 18.79 cents per Mcf to 24.34 cents per Mcf at 15.025 psia. These costs include operating expense; depreciation, depletion and amortization; return; and royalties. Texas Eastern, however, objected to the inclusion of certain items such as royalty payments and severance taxes and the staff argued that, because of a number of considerations, including the use of an untested reservoir and an improper estimate of porosity and connate water, the amount of the reserves

4329

transferred was exaggerated, so that the cost per Mcf was actually higher. Thus, in order to determine the cost, lengthy hearings would be required and careful consideration would have to be given to factors that should not be involved in a certificate proceeding. Even then the per Mcf price of the gas could not be determined with any reasonable degree of accuracy at this time because many of

these factors are based on estimates and forecasts of varying degrees of reliability.

In view of the deficiencies of the lease sale arrangement we are of the opinion that it would serve no purpose to analyze the cost evidence here presented and the objections made to it and that in the exercise of our jurisdiction over the transaction we should require the formulation of a different means for Texas Eastern's acquiring gas supplies. This does not mean that we must invariably oppose a pipeline assembling its own reserves from whatever source. We recognize that there are frequently advantages in a pipeline owning and operating its gas reserves, and we do not hold that all gas purchases on a bulk rather than a per Mcf basis are necessarily contrary to the public interest. What is objectionable here is the attempt to disguise a transaction which in effect is a sale of gas by casting it in the form of a sale of leases with provisions that would make it difficult if not impossible to subject to regulatory control the price for the sale to an interstate pipeline of this large body of gas.

DISPOSITION OF THESE PROCEEDINGS

We have before us a complicated procedural situation. As will be recalled, Texas Eastern shifted from a straight purchase of gas to the lease sale arrangement. In our prior decision we did not hold that we had jurisdiction over this transaction but, in effect, accepted it as labeled by the parties in granting a certificate to Texas Eastern. The reviewing court, without discussion, agreed with the Commission on the question of jurisdiction, but held that we should either have disclaimed approval of the price under the lease sale or should have examined the justification for the price. We reopened the proceeding largely to obtain further evidence on whether the lease sale was consistent with the public interest. We now find that we have juris-

diction over the sale, and that the transaction is not in the public interest as a way to acquire gas supplies.

In these circumstances the parties should be given ample opportunity to work out new arrangements in the light of the requirements of the Natural Gas Act and our discussion in this opinion. We shall therefore afford Texas Eastern and its suppliers a period of 6 months to complete such arrangements and make the necessary filings with this Commission. This delay would not be detrimental to the public because Texas Eastern is already taking gas from the Rayne Field.¹¹

4330

In making the requirement for filing a new arrangement we are not defining our requirements with precision, for we think that in view of the procedural delays and the contractual arrangements that have been made the parties should have considerable freedom to extricate themselves from this complicated situation. However, consistent with our discussion above the lease sale arrangement should be rescinded and the producers, or one producer acting for all, should file rate schedules for the sale of gas to Texas Eastern and corresponding applications for certificates of public convenience and necessity. Texas Eastern, on its part, should file an amended certificate application referring to its purchase of gas. The new contract, of course, would be effective from the delivery of the first gas from the Rayne Field and would be a substitute for the lease sale arrangement now proposed. We do not think it would be inequitable to require this revision, for the Lease Sale Agreement was specifically made subject to the buyer's obtaining a certificate, PSC in the course of the earlier

¹¹ On November 27, 1957, and December 5, 1958, Texas Eastern was granted temporary certificates for part of its proposed facilities, but its permanent certificate for the lateral for the Rayne Field was granted in Opinion No. 322 and in effect nullified by the court.

proceedings had expressed its opposition to the lease arrangement as it was constituted, and the court on review did not affirm our granting of a certificate to Texas Eastern.

The Commission further finds:

(1) Continental, Sun, Marr and General Crude are independent producers of natural gas and natural gas companies within the meaning of the Natural Gas Act as heretofore found by the Commission or by participation in the Lease Sale Agreement discussed herein.

(2) The Lease Sale Agreement referred to above represents sales of natural gas for resale in interstate commerce, which are subject to our jurisdiction under the Natural Gas Act, and such sales, together with the construction and operation of any facilities necessary therefor, are subject to the requirements of Subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Continental, Sun, Marr and General Crude have not obtained certificates or filed rate schedules in connection with their sales of natural gas subject to the jurisdiction of the Commission as required by Section 4 and 7 of the Natural Gas Act.

(4) Texas Eastern is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission in its order issued July 7, 1958 (20 FPC 3).

(5) The construction and operation of facilities by Texas Eastern as hereinbefore described, all as more fully described in the application in these proceedings, will be used in the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission, and the construction and operation thereof are subject to the requirements of Subsections (c) and (e) of Section 7 of the Natural Gas Act.

4331

(6) The construction and operation of facilities subject to the jurisdiction of the Commission as proposed herein by Texas Eastern have not been shown to be required by the public convenience and necessity.

(7) It is appropriate in the administration of the Natural Gas Act that decision on Texas Eastern's application for a certificate of public convenience and necessity be deferred and that further filings be required on the part of Texas Eastern and its suppliers of gas.

The Commission orders:

(A) Decision on Texas Eastern's application for a certificate of public convenience and necessity in the above-entitled proceedings is hereby deferred.

(B) Continental, Sun, Marr and General Crude within six months of the issuance of this order shall make filings of appropriate rate schedules and applications for certificates of public convenience and necessity. Within the same period Texas Eastern shall file a revised application for a certificate to put into effect a new arrangement for the supply of gas to Texas Eastern from the Rayne Field in conformity with this opinion, the public interest and the Natural Gas Act.

(C) Exceptions not granted herein are hereby denied.

By the Commission. Commissioner O'Connor concurring,
filed a separate statement appended hereto, Commissioner Woodward not participating.

GORDON M. GRANT
Gordon M. Grant,
Acting Secretary.

(SEAL)

(4332)

4332

G-12446, G-12447

TEXAS EASTERN TRANSMISSION CORPORATION

G-12432

CONTINENTAL OIL COMPANY

(Issued February 6, 1962)

O'CONNOR, Commissioner, *concurring*:

While I join in the disposition of this case by the majority, certain differences in reasoning require that I express my position separately.

I agree with the majority for the reasons stated in the Order that the question of our jurisdiction over this sale has not been foreclosed. On that question I conclude, first, that the transaction involves a "sale" of "natural gas" as used in Section 1(b) of the Natural Gas Act. Because of the proved nature of these reserves, we have here, in effect, a sale of a relatively well defined block of gas, as distinguished from the sale of indefinite mineral rights over a given area of land. Being a sale of a defined block of gas, it unavoidably becomes a "sale" of "natural gas" contemplated by the Act. Second, I conclude this transaction is "in interstate commerce" because, and solely because, the necessary effect of this sale to an interstate pipeline is to place this gas into the stream or pattern of interstate commerce.

I further agree that the case before us must be remanded because in its present form the sale is not susceptible to effective price regulation. The controlling difficulty, I believe, is that the amount of gas being purchased by the pipeline is indefinite, and therefore the ultimate price per Mcf to be charged the consumers cannot be ascertained. Without knowing the Mcf price of this gas, we have no means of determining whether the price paid for it is in

the public convenience and necessity. For this reason, I would remand the case for the parties to the transaction to remedy this defect. This can be done by obtaining a guarantee from the producers that the reserves will produce a minimum amount of gas, by obtaining a stipulation from all parties in this case of the minimum reserves, or by producing compelling expert evidence of the minimum figures.

If the transaction is so modified, I believe we will be in a position to effectuate our duties under the Natural Gas Act. It is true that the form of this transaction will still be unusual, and because of this fact it will produce difficulties in techniques of regulation. Particularly, since this transaction contemplates an outright sale of a block of gas for a fixed and certain price, the Commission will have only one occasion to pass on the appropriateness of the price, rather than a continuing jurisdiction to readjust it to changing circumstances. The majority on page 9 of its Order suggests that this difficulty is fatal (although on page 10 it notes that all

4333

in-place purchases are not hereby precluded). I thoroughly disagree. There is nothing inherent in a one-shot transaction that precludes effective regulation. All recent regulation of pipeline production has been done on this basis—expenses for outright purchases of undeveloped leaseholds, lands or rights once incurred and approved go into the rate base and are not subjected to continuing adjustments, whether paid for in cash or on an installment basis.

To make this regulatory inconvenience a controlling factor would be to rule out in-place purchases by pipelines since it would eliminate the attraction to producers of receiving a firm price for a completed sale of a defined block of gas. The net effect would be that a pipeline with the

(4333)

staff, facilities, and finances for exploration and development could obtain its own production with all the advantages thereof, but a pipeline not in a position to carry out an exploration program could not obtain its own production by purchasing proven reserves in place. Such a result, I submit, would be violative of the public interest.

L. J. O'CONNOR, JR.
Commissioner

4334

**BEFORE THE
FEDERAL POWER COMMISSION**

In the Matters of

**TEXAS EASTERN TRANSMISSION CORPORATION
CONTINENTAL OIL COMPANY**

Docket Nos. G-12446, G-12447, G-12432

March 6, 1963

**Application For Rehearing
And Stay By General Crude Oil Company**

Comes now General Crude Oil Company (General Crude) and, pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, being aggrieved, hereby applies for rehearing and stay of the Commission's Opinion No. 378 and accompanying order in the above-entitled proceedings, issued on February 6, 1963. In support of this application for rehearing and stay, General Crude states as follows:

I.

General Crude adopts as its own application for rehearing and stay herein the application for rehearing and stay by Sun Oil Company (Sun), which is concurrently being

(4335)

filed in the above-entitled proceedings. A copy of Sun's application is attached hereto and incorporated herein. The factual position of General Crude in the transactions and proceedings under consideration by the Commission in its Opinion

4335

No. 378 is in all particulars parallel with and identical to that of Sun, with the exception of the fractions of interest and amounts of money involved in the transfer of the interest in gas leaseholds by General Crude. The positions set forth in the application for rehearing and stay by Sun with respect to the law applicable to such transactions in the above-entitled proceedings are hereby adopted by General Crude.

WHEREFORE, for all of the foregoing reasons, General Crude requests the Commission to grant this application for rehearing and to reverse and set aside its Opinion No. 378 and accompanying order. If the Commission should not grant this application, General Crude requests that the Commission stay Opinion No. 378 and the accompanying order pending judicial review.

Respectfully submitted,

GENERAL CRUDE OIL COMPANY

W. M. Streetman

ANDREWS, KURTH, CAMPBELL & JONES

By HERF M. WEINERT

Herf M. Weinert

Andrews, Kurth, Campbell & Jones

W. M. Streetman

Humble Building

Houston, Texas

Attorneys for General Crude Oil Company

March 6, 1963

(4336)

4336

DISTRICT OF COLUMBIA) SS

Before me, the undersigned authority, on this day personally appeared Herf M. Weinert, who, being by me duly sworn, on oath deposes and says: That he is Attorney for General Crude Oil Company; that he has prepared and read the foregoing Application of General Crude Oil Company for Rehearing, and that the facts stated therein are true to the best of his knowledge, information, and belief.

/s/ HERF M. WEINERT
Herf M. Weinert

Sworn to and subscribed before me, this 6th day of March, 1963.

/s/ THOMAS C. EVANS
Thomas C. Evans

(Seal)

My Commission expires September 14, 1965.

4337 - 4340

Docket No. G-12446, et al.

CERTIFICATE OF SERVICE

4353

BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

TEXAS EASTERN TRANSMISSION CORPORATION
CONTINENTAL OIL COMPANY

Docket Nos.
G-12446, G-12447
G-12432

Application For Rehearing
And Stay By Sun Oil Company

Comes now Sun Oil Company (Sun) and, pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, being aggrieved, hereby applies for rehearing and stay of the Commission's Opinion No. 378 and accompanying order in the above-entitled proceedings, issued on February 6, 1963. In support of this application for rehearing and stay, Sun states as follows:

I.

Sun filed an application for a disclaimer of jurisdiction, or, in the alternative, for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, on July 17, 1957, to sell natural gas to

4354

Texas Eastern Transmission Corporation (Texas Eastern) from the Rayne Field in Docket No. G-12913. However, the contract involved was cancelled and the certificate application was withdrawn, as recited in the Notice of Withdrawal which Sun filed with the Commission on July 9, 1958. This Notice of Withdrawal was formally accepted by the Com-

(4354)

mission by letter from the Acting Secretary, dated August 11, 1958, by direction of the Commission, addressed to Sun Oil Company, the body of which reads as follows:

"Pursuant to Section 1.11(d) of the Commission's Rules of Practice and Procedure, the notice of withdrawal filed on July 9, 1958 by Sun Oil Company in Docket No. G-12913 became effective on August 9, 1958 and the record in this proceeding was closed as of that date.

"By direction of the Commission."

II.

The Commission's Opinion No. 378 and accompanying order purport to treat and to make Sun a party to these proceedings at this time and to enter an order affecting Sun's rights and interests. On that premise Sun has standing to file this application for rehearing and stay. Assuming, for the purpose of this application, that Sun was made a party to these proceedings by the order issued

4355

February 6, 1963, the order is unlawful and void as to Sun, *inter alia*, because (1) the Commission lacks jurisdiction over the gas leases involved; (2) the Commission lacks jurisdiction over the transfer of the gas leases involved; (3) the Commission lacks jurisdiction to order Sun, as purportedly required by Paragraph (B) of its order, to "make filings of appropriate rate schedules and applications for certificates of public convenience and necessity"; and (4) the Commission lacks jurisdiction to order Texas Eastern, as further purportedly required by Paragraph (B) "to put into effect a new arrangement for the supply of gas to Texas Eastern from the Rayne Field in conformity with this opinion."

III.

In reaching the erroneous conclusion that it has jurisdiction over the leases and the transfer of leases involved, the Commission avowedly seeks to overrule and set aside its own prior decision in this case, the opinion of the Court of Appeals of the District of Columbia in this same case, the decision of the Presiding Examiner in the reopened proceeding, and the opinion of the Supreme Court of the United States in another case which involved this identical issue. Thus, in its effort to broaden its jurisdiction beyond that

4356

conferred upon it by Congress in the Natural Gas Act, the Commission has flagrantly disregarded Commission and Court precedent, all of which are contrary to the conclusion reached in this case. This fact is readily demonstrable.

IV.

In its Opinion No. 322 in these proceedings, issued June 23, 1959, approving the construction and operation of facilities by Texas Eastern to take the Rayne Field gas the Commission found (21 F.P.C. 860, at page 864):

"... Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases *and we have no authority to issue such a certificate*" (Italics supplied).

Thus, contrary to the statement in the Commission's current Opinion No. 378 (page 5) there was "discussion" by the Commission of the jurisdictional issue in its Opinion No. 322, and it held that it lacked jurisdiction.

Moreover, on appeal, the Court of Appeals for the District of Columbia Circuit, in *Public Service Commission v. Federal Power Commission*, 287 F. 2d 143, specifically

discussed the jurisdictional issue in its decision, at several points, as follows (page 145):

4357

"The significance of this change in the form of the transaction, at least from the standpoint of the producer-sellers, is manifest. Sales of natural gas by an independent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petroleum Co. v. State of Wisconsin*, 1954, 347 U.S. 672 S.Ct. 794, 98 L.Ed. 1035. But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed. 1499. . . ."

Further, the Court stated (page 146):

"It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, *beyond the regulatory control of the Commission*" (Italics supplied).

Despite this clear and unequivocal discussion and holding by the Court of Appeals in this case, the Commission now, in its Opinion No. 378, seeks to minimize the effect of and to discard the Court's finding that it lacks jurisdiction. The Commission erroneously states that the Court "without discussion" held that the Commission lacked jurisdiction. Furthermore, the Commission erroneously states that the jurisdictional question was "hardly considered" and was given but "passing mention" by the Commission and the Court (Opinion No. 378, page 5). The Commission thus attempts to repudiate the finding of the Court of Appeals in this very case by erroneously accusing the Court of not seriously considering the

4358

jurisdictional issue. If any further proof were needed that the question of jurisdiction over the transaction was considered in the case, a reference to the Commission's brief in the Court reveals that it repeatedly emphasized the Commission's lack of jurisdiction and cited authorities to support its position.

V.

The Commission erroneously concludes in Opinion No. 378, (page 7) that the instant proceeding is "distinguishable" from that involved in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. That case is directly in point and constitutes a precedent which precludes the assertion of jurisdiction by the Commission over the transfer of leases here involved.

The Commission's first ground of purported distinction is the assertion that in the *Panhandle* case "the leases were undeveloped so that the transfer did not resemble a sale of gas as did the sale of developed leaseholds here" (page 7). The opinion of the Supreme Court in the *Panhandle* case clearly discloses that it was not based upon the narrow ground advanced by the Commission. Repeatedly throughout its opinion the Supreme Court referred to "gas leases" as such, and without distinction as to development or non-development,

4359

as an "essential part of production" and therefore beyond the Commission's jurisdiction because of the "production and gathering" exemption in Section 1(b) of the Natural Gas Act (337 U.S. at pages 505, 508, 513, 515). Moreover, it is equally clear from the Supreme Court's opinion that it was aware of the fact that exploration and development had taken place sufficiently to enable reserve estimates to

(4359)

be made. Thus, the majority opinion of the Court recites that Panhandle "had included the acreage here involved as part of its gas reserves." Justice Black, in his dissenting opinion, stated that (337 U.S. at page 519):

"... According to allegations in the Commission's complaint the respondent gas company has already received from its customers large sums of money from rates which reflected expenses incurred in maintaining these reserves and for exploration and development costs in relation to them."

An examination of the complaint which the Commission filed in the United States District Court demonstrates the extent to which exploration and development activities had actually taken place on the gas acreage involved in the *Panhandle* case. Thus, the Commission alleged in its complaint, in the United States District Court (Paragraph XVII) that:

"The delay rentals, renewal/bonus payments and other exploration and development costs relating to aforesaid natural-gas leases included

4360

by the Commission in Panhandle's operating revenue deductions in the rate proceedings referred to in Paragraph (c) of the Commission's order of November 10, 1948, Exhibit 'B' hereto, amount to date to a sum in excess of \$665,000."

The gas leases involved in the *Panhandle* case had been explored and developed sufficiently to result in an accepted gas reserve estimate of 700 billion cubic feet (337 U.S. at page 500). It stands to reason that an estimate of such a substantial reserve, comparable in magnitude to that in the Rayne Field, could not have been made or accepted without adequate exploration and development. Moreover, nowhere in any of the decisions in that case

was there any refutation of the fact that substantial "exploration and development costs" had been incurred prior to the transfer of the leases. The facts of the *Panhandle* case are precisely parallel with the instant one in this respect because the Commission has itself recognized and stated, in its Opinion No. 378, that the gas leases here involved "had been developed to an extent where reasonable estimates could be made as to the available reserves," (Opinion No. 378, page 6).

The second purported ground of distinction of the *Panhandle* case is the assertion by the Commission in Opinion No. 378 that "the reserves here are connected or are to be

4361

connected to an interstate pipeline and are to be sold in interstate commerce while those in *Panhandle* were transferred to a corporation which subsequently sold them in intrastate commerce" (pages 7-8). Here again, the Commission obviously has groped for a purported distinction which has no substance whatever. The Supreme Court in the *Panhandle* case did not predicate its decision upon the circumstance that the gas which might be produced from the leases involved in that case was to be sold intrastate. Rather, the Court repeatedly emphasized that the Commission was prohibited by the provisions of the Natural Gas Act from interfering in the forbidden area of transfer of gas leases because gas leases and gas reserves are production facilities over which the Commission has no jurisdiction and because the transfer of gas leases and gas reserves is a production activity over which the Commission has no jurisdiction. Among other things, the Supreme Court said (337 U.S. at pages 513-514);

"The District Court found as a fact, and the finding is undisputed by the Commission, that, 'It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has

(4361)

never heretofore asserted the right to regulate transfers of such leases.' Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage.

4362

Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. If possible all sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power." (footnotes omitted)

With the exception of this *Panhandle* case where the Commission was overruled, ever since the enactment of the Natural Gas Act in 1938 and ever since the decision of the Supreme Court in *Phillips* the Commission has never heretofore attempted to exercise jurisdiction over gas leases or the transfer of gas leases.

The third purported distinction of the *Panhandle* case relied upon by the Commission is the erroneous statement that "in the *Panhandle* case the gas reserves passed entirely out of the control of the seller while here the seller retained rights to oil, gas if found other than in particular strata, production payments for liquids, and management of the field" (Opinion No. 378, page 8). In the first place, Sun retained no rights whatsoever in the gas leasehold estates which it sold except only its mortgage lien to

4363

secure unpaid portions of the consideration. Sun retained no management rights over any of the gas leasehold estates

which it sold. In the second place, the Commission completely disregards the fact that the Supreme Court in the *Panhandle* case dealt with gas leases as production facilities and the transfer of gas leases as an activity of production. In addition, the Commission is factually incorrect when it asserts that in the *Panhandle* case the "gas reserves passed entirely out of the control of the seller." The Supreme Court's decision in that case recites that *Panhandle* retained "the option to purchase on or after January 1, 1965, all or part of the gas produced from this land" (337 U.S. at page 500). Thus, the *Panhandle* case involved a reservation of the right to purchase all or part of the gas produced representing a considerably more far-reaching retention of rights than the normal security for payment of consideration retained by Sun.

The Commission next purports to rely upon the Supreme Court's decision in the *Phillips* case (347 U.S. 672), apparently for the premise that the *Phillips* case was intended to overrule the prior *Panhandle* case. In reaching this conclusion, the Commission conveniently disregards the fact that the Supreme Court, when it decided the *Phillips* case, was well aware of its prior decision in the *Panhandle* case. Rather than overruling the latter case in any respect, it was cited

4364

and relied upon by the Supreme Court when it decided *Phillips* (347 U.S. at page 678). Moreover, the Court of Appeals for the District of Columbia Circuit, when it decided the instant case, cited both the *Phillips* and *Panhandle* cases and distinguished them when it held the Commission to be without jurisdiction over gas leases. The Court said (287 F. 2d 143 at page 145):

"... Sales of natural gas by an independent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petro-*

(4364)

leum Co. v. State of Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035. But the Commission has been held to lack of jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed. 1499...."

In this respect also the Commission has defied the decision of the Court of Appeals for the District of Columbia Circuit in this very case. We have noted the fact that the Commission has heretofore announced, in *Cities Service Gas Co.*, 26 F.P.C. 665, 666, that "we are not bound by the decision of one circuit." We are further amazed by the Commission's statement in *Lo-Vaca Gathering Co.*, 26 F.P.C. 606, 615, that, to the extent to which a court decision "may be inconsistent with the action we take here, we believe it was erroneously decided." However, this is the first instance we know of where the Commission has dared to defy the ruling of a Court of Appeals in the same case under consideration.

4365

The consequences and implications of this course of action, if permitted, would effectively destroy the rights of parties to court review and render the decisions of the courts meaningless.

The citation by the Commission of the cases of *Saturn Oil & Gas Co. v. Federal Power Commission*, 250 F. 2d 61 and *Continental Oil Co. v. Federal Power Commission*, 266 F. 2d 208, is equally without merit. In the *Saturn* case, the Court specifically gave effect to the doctrine of the *Panhandle* case when it stated (250 F. 2d at page 68):

"In *Interstate Natural Gas Co. v. Federal Power Commission* and *Federal Power Commission v. Panhandle Eastern Pipe Line Co.* the court recognized that effect must be given the production or gathering exemption. These cases and *Colorado Interstate Gas Co.*

v. *Federal Power Commission* are referred to in the Phillips decision as holding that the production or gathering exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas and not to the business of production and gathering. Until there is a sale of the natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such a sale the jurisdiction of the Commission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction."

In the *Continental* case the Court also gave effect to the *Panhandle* case stating that (266 F. 2d at page 210) "Although not specifically so providing, the language of this exemption [Section 1(b) exemption of production or gathering] has, as to other types of facilities, been held

4366

to cover facilities of production or gathering. See *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 504-505." The basis for the Court's decision was that "this record discloses that these are facilities for the sale of the gas that are not facilities of production" (266 F. 2d at page 211).

It is apparent that these cases confirmed the holding of the Supreme Court in the *Panhandle* case and in no manner constitute precedents for overruling that decision as the Commission has here attempted. Furthermore, the *Saturn* and *Continental* cases as authority for the Commission's position here are not applicable because there are no facilities retained or owned by Sun which could be or are used for the production of gas. Therefore, the Commission's attempted reliance upon these cases is refuted by the Commission's own statement in Opinion No. 378 (page 8) that in those cases, "production was complete before the point of sale." This language supports our own position, based

(4366)

upon the factual situation here, where the leases and all facilities were sold by Sun before production for sale or transportation in interstate commerce occurred.

4367

VI.

The extent to which the Commission flagrantly and avowedly seeks, by its Opinion No. 378, to extend its jurisdiction beyond that conferred upon it by Congress in the Natural Gas Act is well illustrated by the conclusionary language on pages 8-9 of Opinion No. 378, where the Commission states:

"Thus we conclude that a sale of gas in interstate commerce during the course of production and gathering is subject to our jurisdiction. Likewise, the sale of gas (or reserves) made under the circumstances here involved by the producers to Texas Eastern for transportation in its pipeline is a sale of gas for resale in interstate commerce and is subject to our jurisdiction."

The omission from the first sentence and the first clause of the second sentence of the foregoing quotation of the words "for resale" when referring to the "sale of gas" or the "sale of gas (or reserves)" is especially significant. The Commission's reasoning seems to be that *any* sale of gas *should* be subject to its jurisdiction. Thus, it would disregard the requirement that a sale must be for resale to be subject to its jurisdiction. To attain this objective, forbidden by Congress and the Supreme Court, the Commission is now saying that any sale of *property* which contains gas in formation is subject to its jurisdiction. Moreover, by the insertion of the parenthetical words "or reserves" the

4368

Commission magnifies the illegality of the conclusion it has reached and directly defies the Supreme Court's opinion

in the *Panhandle* case where "gas leases" and "gas reserves" were considered synonymous and distinguished from sales for resale of natural gas. The boot-strap reasoning which the Commission engages in to justify its assertion of jurisdiction is apparent and is patently unlawful.

The Commission next attempts to justify its assertion of jurisdiction on the ground of administrative expediency (Opinion No. 378, page 9). This ground, when it results in expanding the Commission's statutory jurisdiction, has been rejected by the Courts. See, for example, *Mississippi River Fuel Corp. v. Federal Power Commission*, 202 F. 2d 899. As stated by the Supreme Court in *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 322, "the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." And as further stated by the Supreme Court in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8, "However, respondents correctly point out that Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority

4369

over certain aspects of this field, leaving the residue for state regulation."

VII.

In its Opinion No. 378 (pages 5-6) the Commission indulges in an obvious misinterpretation of its order of July 14, 1961, reopening these proceedings (26 F.P.C. 167) issued after the decision of the Court of Appeals for the District of Columbia Circuit. This order reopening the proceedings first quotes from the next to the last paragraph of the Court's decision (287 F. 2d at page 146) where the

Court stated that "Two courses are open to the Commission." The first course, which contemplated clarification of the order under review, was rejected by the Commission. The second suggested course authorized the Commission to "reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity." In selecting the second course, the Commission stated that it would "reopen the record in this proceeding to afford Texas Eastern an opportunity to make that showing contemplated by the Court's aforesaid latter course."

Thus, the proceedings were reopened in accordance with the Court of Appeals decision. And this is the same Court of Appeals decision which held that the Commission lacked

4370

jurisdiction over the transfer of leases insofar as the producers were concerned. In Opinion No. 378, however, the Commission has attempted to distort the language and intent of its order of reopening by seizing upon the language of the order which purported to define "but not necessarily limit" the issues as justification for considering the question of jurisdiction at this time. The necessary effect of the Commission's action is to accept the Court's decision only in part, and to disregard the portion of the Court's decision which, as we have demonstrated, clearly held the Commission to be without jurisdiction. The Commission also mentions the language in its order reopening the proceeding wherein it referred to whether the certificate should be "reissued in whole or in part." Certainly this language cannot legally be construed to authorize the Commission to follow the Court's decision only "in part" as the Commission does in Opinion No. 378.

VIII.

The Commission further seeks to justify its unlawful assumption of jurisdiction on the premise that "the producers transferred natural gas to Texas Eastern for resale by Texas Eastern in the interstate market." In this discussion (Opinion No. 378, pages 6-7) the Commission states that it should look beyond the "label" of the transaction to its essence, and that

4371

"the effect resembles the ordinary sale of gas" because of certain "features" enumerated by the Commission. No one or all of the five asserted "resembling features" set forth by the Commission in any manner transform the assignment and conveyance here involved, which has already been fully consummated, into a contract for the sale of gas for resale, as attempted by the Commission. The transaction was a transfer of leases and not a sale for resale of natural gas. No amount of transmogrification by the Commission, such as attempted in Opinion No. 378, can convert the transaction into a sale for resale. The short answer to this discussion by the Commission is that if the transaction were a sale for resale there would be no occasion for the Commission to attempt to rescind the transaction and require a sale for resale contract to be entered into. In other portions of Opinion No. 378 (page 2) the Commission clearly recognizes the correct nature of the transaction and its later effort in Opinion No. 378 to convert it into a sale for resale serves only to emphasize the extent to which the Commission has been willing to go in order to enlarge its jurisdiction beyond that conferred by the Natural Gas Act.

IX.

On page 11 of Opinion No. 378, in its discussion under the heading "Disposition of These Proceedings" the

Commission recites that the "lease sale arrangement" should be rescinded" and a "new contract" be entered into. Assuming *arguendo*, that the Commission has jurisdiction over this transaction (which Sun denies), nevertheless, this requirement is patently unlawful. There is no provision in the Act which authorizes the Commission to direct that binding contracts, such as the Assignment and Conveyance, the Promissory Notes, and the Act of Mortgage and Pledge here involved, be rescinded and a "new contract" be entered into. The Commission has obviously attempted to assume powers not granted to it in the Natural Gas Act. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 338.

Moreover, to compound its erroneous and unlawful assumption of power, the Commission is apparently attempting to make its decision retroactive, for it states, on page 11 of Opinion No. 378, that "The new contract, of course, would be effective from the delivery of the first gas from the Rayno Field and would be a substitute for the lease sale arrangement now proposed." It has been established beyond controversy that the Commission does not possess any power retroactively to fix rates such as is contemplated by the requirement that a "new contract" be entered into, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246.

Furthermore, it has been held that any condition attached to a certificate issued by the Commission, such as attempted here to be imposed upon Texas Eastern, must be consonant with the Commission's authority under other provisions of the Act. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508; *Central West Utility*

Co. v. Federal Power Commission, 247 F. 2d 306; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 204 F. 2d 675, 680. Moreover, it has been judicially determined that in a Section 7 certificate proceeding the Commission must make findings, in accordance with the statute, of present or future, rather than past, public convenience and necessity, *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741, 752; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 236 F. 2d 289, 292.

Under the foregoing and other decisions, which could be cited, the Commission's attempt here to give retroactive effect to its findings is clearly invalid.

4374

X.

In addition to the ultimate errors in the findings and orders contained in Opinion No. 378 which are of such consequence as to merit the grouping for discussion hereinabove set forth, there are many errors of fact and conclusion which in total contribute to the erroneous action taken by the Commission.

On page 2, paragraph 1, the Commission errs in failing to state the gap in time between the cancellation of Sun's conventional contract of sale of gas and notice of withdrawal of application for certificate of public convenience and necessity on July 9, 1958, and the execution of the Lease Purchase Agreement on December 4, 1958, during which time no interest or claim or contractual right of any kind existed in Texas Eastern in Sun's properties, or the right to gas which might be produced therefrom.

By this means the erroneous conclusion is arrived at that there was an uninterrupted process by which Texas Eastern merely "amended its application to reflect a change in its plan for acquiring the Rayne Field gas." In fact, it abandoned its plan to buy gas, and bought leases instead.

(4374)

On page 2, paragraph 2, the Commission errs in stating that "The difference is solely in contractual arrangements." The difference is one of substance between acquiring

4375

a recognized interest in leases, a real right under the law of Louisiana, and an executory contract to receive personal property (gas) as delivered and to pay by the unit for such personal property after delivery,

On page 2, paragraph 2, it is error to state that "the facilities to be built by Texas Eastern would be essentially the same." Texas Eastern bought, and operates entirely by itself, a gathering system and central dehydration facilities and was required to provide extraction plant processing facilities, none of which were required of it under the former gas sales contracts.

On page 2, paragraph 2, it is error to state that there were only 16 promissory notes, rather than 16 for each seller of gas leasehold interests.

On page 2, paragraph 2, it is error to describe the production payment as "covering all liquids to be extracted from the gas", when in fact it was payable in money, *based on the value of liquids* extracted. Such liquids, being gas throughout the production process, belonged entirely to Texas Eastern when produced from the gas leaseholds, and were not retained by the sellers.

On page 2, paragraph 2, a serious error in referring to the Lease Sale Agreement is made by stating that it "is subject to certain conditions", implying that it is an existing

4376

and operative document. This error continues throughout Opinion No. 378, because of the Commission's failure to

1004

recognize that it is nothing more than the familiar "Contract of Sale" by which land is uniformly bought and sold. It was merged by the Assignment and Conveyance on July 27, 1959, and has no present existence. The owner of land holds under his deed, not the preliminary contract of sales. Perhaps the Commission finds it easier to think of cancelling an executory document than one executed over four years ago, but this does not make it so.

On page 2, paragraph 3, the Commission errs in stating that "Based on total recoverable reserves of 990,000 MMcf Texas Eastern acquired approximately 79 percent under the original leasehold acquisition transaction in 1958."

Since Texas Eastern bought leasehold interests, it got the right to produce whatever the leases contained, whether 500 billion Mcf or one trillion and 500 billion Mcf. Neither quantity, estimated or produced, would alter the fact that Texas Eastern acquired the right to produce 100 per cent of the gas covered by each lease, and the total reserves so covered were estimated at 95 per cent of the reserves in the sale area.

The refusal of the Commission to recognize the substantial difference between a concept of "reserves" as

4377

"gas in place", and on the other hand as lease rights to produce gas, leads to this error. The first concept is legally impossible in Louisiana. No one can own gas in place. Conversely, a lease grants the right to produce *all* the gas one can, including that on which royalty must be paid. There is no "royalty gas" owned as such either in place, or even after production under the typical lease. The lease owner owes royalty in money, based on the value of the royalty fraction of the total.

Thus, the fact is that the lease interests assigned by the four major parties covered over 95 per cent of the esti-

mated reserves. Those of the minority interest owners, such as H. E. Dishman, most of which were acquired by Texas Eastern, were estimated to cover over 4 per cent. In computing consideration for the leases only, since the royalties were only required to be paid when gas was produced later by Texas Eastern, the royalty fraction to be attributed to total reserves was deducted. In the case of Continental, Sun, Marr and General Crude, the royalty fraction totalled 16 and a fraction per cent, which when combined with the so-called "working interest only" figure of 79 plus per cent correctly shows what the lease interest really covered, and Texas Eastern really bought, namely, the right to produce over 95 per cent of the gas in the leaseholds.

4378

On page 3, the first incomplete paragraph, the Commission errs in construing the leaseholds purchased to cover only 81.5 per cent of the reserves. They cover nearly 100 percent. It is correct that these leases carry a royalty burden equal to approximately 18 per cent of the reserves. However, the right to this gas as produced inheres in the leaseholds. Texas Eastern does not buy or "pay for it." It accounts in cash, based on a judgment of market value under the lease terms, which may be more or less than 22.6 cents per Mcf through the life of production.

On page 4, paragraph 2, the Commission errs to the extent that its reference to the Examiner's initial decision of June 29, 1962, may imply a finding in Opinion No. 378 that there was a dedication of the Rayne Field gas to the interstate market as of April 22, 1957. No gas was produced by anyone for delivery to the interstate market before August, 1959 and then only by Texas Eastern.

On page 4, the third complete paragraph, the Commission erroneously refers loosely to an issue of jurisdiction over "the lease sale arrangement." As demonstrated

above, this is not descriptive of any identifiable document or set of documents. The operative instruments are an Assignment and Conveyance from Sun to Louisiana Gas. Notes from Louisiana

4379

Gas to Sun, Act of Mortgage and Pledge from Louisiana Gas to Sun, and Conveyance from Louisiana Gas to Texas Eastern. It is prejudicial and lacking in specification adequate to inform Sun or a reviewing court as to the meaning of the Commission to refer to an "arrangement." The purpose of the Commission to use this inexactitude to color the characterization it gives a normal mineral rights transaction becomes evident as it proceeds.

On page 4, last paragraph, it is error to hold as to Sun that "what was to be a sale of gas has been converted into sale of leases." The evidence is undisputed that Sun cancelled its contract and withdrew its application for certificate *unconditionally* on July 9, 1958, without any strings on it or Texas Eastern. Either party was free to walk away for five months thereafter. Texas Eastern's application to reopen in September, 1958, was only in a fond hope of buying Sun's leases. It had no assurances that it could buy from Sun either leases or gas on that date.

Additionally, the term "conversion" is without specific meaning, beyond the continued and unjustified effort of the Commission to choose terms of coloration to suggest an undisclosed commitment to tie the gas sale to the lease sale. There was none, and there is no evidence of such.

4380

On page 4, last paragraph, Sun objects to the error in the Commission's language purporting to cast aside any evidence of form as being of no substance, saying it is immaterial "whether technically in the form of leasehold

transaction or otherwise." This reasoning, if unchallenged, would be equally appropriate to an outright deed to lands containing gas, and to the familiar oil, gas and mineral leases thereof. The forms of real property and mineral law have established meaning in substance which the Commission cannot brush so lightly aside.

On page 6, paragraph 2, the Commission errs in referring to "the in-place sale of the Rayne Field gas to Texas Eastern." There is no legally recognizable sale of gas in place under Louisiana law. One may only own the land or the right to produce minerals therefrom (as by a lease), or one may own gas after severance by production. No one can own, or sell, gas in place. This error is materially prejudicial as part of the Commission stratagem to shift words in order to make a lease assignment look like a gas sale.

On page 6, paragraph 2, the Commission errs in its argument that any conveyance of property which may be capable of producing gas must be regulated because it assumes the local law does not so regulate. The "gap" argument, so stated, would apply equally to a sale by simple deed, to the oil and

4381

gas lease, to a sale of royalty and to a mortgage. All these transactions are subject to State and local law and cannot, as expert testimony in this case reflects, be arranged at the whim of parties. There is no evidence of any limitation on the right of the state to employ other regulation on transfers of interest in land within its borders. No "gap" is shown, nor any conflict. The two sovereign's powers join precisely here.

On page 6, paragraph 3, the Commission errs in saying that this gas, still in the formation, "was sold in bulk." Gas cannot be sold either in bulk or by the unit while unproduced, under the law of Louisiana. If sold after severance, the only way it could be sold would be on a per Mcf

or other unit basis. If unproduced, the only way to obtain the gas is to buy the land, or the leasehold right in land permitting production from the land. The term "bulk" then could have only the phantom meaning of a body of gaseous vapor for which there was no container. It is as impossible under the laws of physics as under the Code Napoleon. The truly prejudicial error is the laying of the foundation in semantics for the slide from "bulk" to "wholesale" at a later point, where the meaning of the latter term is to be given a reincarnation never intended in the Natural Gas Act.

4382

On page 7, numbered paragraph 4, it is error to say that the management agreement provides for Continental to operate "the field," when it is only the assigned leasehold interests to which it applies. Functions of parties Seller in the remainder of the field are not involved. Further, as pointed out before, Texas Eastern itself operates the gathering system and central dehydration facilities.

On page 7, numbered paragraph 5, the Commission errs in saying Texas Eastern is not bound by the principal obligation. It is not liable personally, but it holds its leases securely bound by note indebtedness and mortgage liens, subject to which it purchased from Louisiana Gas.

On page 8, first complete paragraph, the Commission erred in its interpretation of *Phillips* as referring to "wholesales of natural gas in interstate commerce" as including the instant transaction, regardless of the *Panhandle* case, on the theory that this is a "bulk" sale, which is assumed to be synonymous with a "wholesale." As used in *Phillips* and under the Act, the term "wholesale" relates only to the "sale for resale" provisions.

On page 10, first complete paragraph, there is prejudicial error in the statement that "What is objectionable here is the attempt to disguise a transaction which in effect is a sale of gas by casting it in the form of a sale of

4383

leases * * *." There is no evidence to support this charge of devious purpose. All the evidence is that this transaction has been exposed for the public view since 1958. No single concealed purpose, sub-rosa action, or misrepresentation beneath the facts shown in the documents exists. Unless one accepts the evident Commission view that it should regulate all natural gas properties *contra Panhandle*, there is no "disguise" involved in refusing to sell gas in interstate commerce. There is no questionable device presumed when one sells his leases in preference to selling gas. If there is, a "natural gas company" now is anyone owning land under which there may be gas. He cannot even turn away by trying to sell the land. This is a "disguise" only in terms of an unwarranted grab for ungranted power by the administrative agency.

On page 11, finding (1), it is erroneous to find that Sun is a producer of natural gas and a natural gas company "by participation in the Lease Sale Agreement" for reasons set forth heretofore.

On page 11, finding (2), the Commission wrongfully finds that "The Lease Sale Agreement referred to above represents sales of natural gas for resale in interstate commerce," for reasons discussed above.

On page 12, findings (7), the Commission erroneously describes Sun and other sellers as "suppliers of gas," for reasons fully presented in this application.

4384

In the Concurring Opinion, page 1, paragraph 2, it is erroneous to find that this transaction is "a sale of a relatively well defined block of gas" since such a block cannot be physically capable of sale except it be in its container, the formations subject to the gas leases. In that form, the law of Louisiana prevents any sale of gas. Only the con-

tainer, by sale of land, or the right to produce, by lease, may be sold.

XI.

The Commission erred in disregarding the determination of the Internal Revenue Service in Ruling dated January 13, 1959, that the sales in the form described in the Lease Sale Agreement were of leasehold rights subject to tax treatment as capital gains rather than sales of gas subject to treatment as normal income, since such action of the Internal Revenue Service as a representative of the United States was binding upon the Commissioners as other officers of the Government under the doctrine of *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381.

WHEREFORE, for all of the foregoing reasons, Sun requests the Commission to grant this application for rehearing

4385

and to reverse and set aside its Opinion No. 378 and accompanying order. If the Commission should not grant this application, Sun requests that the Commission stay Opinion No. 378 and the accompanying order pending judicial review.

Respectfully submitted

SUN OIL COMPANY

/s/ ROBERT E. MAY
Robert E. May,
Its Attorney

JOHN A. WARD, III
PHILLIP D. ENDOM
1608 Walnut Street
Philadelphia 3, Pennsylvania

JOINER CARTWRIGHT
HERF M. WEINERT
P. O. Box 2831
Beaumont, Texas

(4385)

ROBERT E. MAY
May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D.C.

Attorneys for Sun Oil Company

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas
Of Counsel

4386

DISTRICT OF COLUMBIA: SS.

Robert E. May, being first duly sworn, deposes and says that he is an attorney for Sun Oil Company; that as such he has signed the foregoing "Application for Rehearing and Stay by Sun Oil Company" for and on behalf of said Company; that he is authorized so to do; that he has read said Application and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

/s/ ROBERT E. MAY
Robert E. May

Subscribed and sworn to before me, a Notary Public, this 6th day of March, 1963.

/s/ THOMAS C. EVANS
Thomas C. Evans
Notary Public

[SEAL]

My Commission expire September 14, 1965.

4387 - 4390

CERTIFICATE OF SERVICE

1012

4391

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-12446

TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. G-12447

TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. G-12432

CONTINENTAL OIL COMPANY

Application of Continental Oil Company
For Rehearing

4392 - 4394

TABLE OF CONTENTS

4395

Comes now Continental Oil Company, and pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, hereby applies for a rehearing in respect of the Commission's Opinion No. 378 (including the Further Findings and Order accompanying said Opinion) issued February 6, 1963.

The grounds for this Application and the errors which Continental asserts were made by the Commission are hereinafter set forth.

For brevity's sake, the following contracted names will generally be used herein:

Continental Oil Company—"Continental"

Sun Oil Company—"Sun"

M. H. Marr—"Marr"

General Crude Oil Company—"General Crude"

(4395)

- The foregoing, collectively—"Continental et. al." or "Assignors"

Texas Eastern Transmission Corporation and/or
Louisiana Gas Corporation—"Texas Eastern"
Internal Revenue Service—"IRS"

4396

INTRODUCTION

In these United States of America, there is nothing wrong in a private citizen's framing his business transactions in such lawful way as will avoid unfavorable governmental impositions. Steps to this end are taken every day, for instance, to minimize tax liabilities. In this very case, Continental et al. conditioned their agreement to assign their Rayne Field leasehold rights and interests to Texas Eastern upon the issuance of an IRS ruling that the Assignors' profits from the transaction would be taxed at the comparatively low rate applicable to long term capital gains. IRS duly issued such a ruling in January 1959. It is unthinkable that IRS could now, four years later, legally revoke its ruling because it has changed its mind and feels that Continental et al. should have sold gas instead of real estate and should thereby have subjected themselves to higher tax liabilities.

It is equally unthinkable that this Commission may now—also four years later—legally revoke its prior ruling (which has since been confirmed by an appellate court), because the Commission has changed its mind and wants to expand its powers into areas forbidden to it by the Congress and the Supreme Court of the United States.

4397

The Panhandle Case

Another classic example of perfectly proper and lawful avoidance of governmental impositions was presented in

the case which is the fountainhead of the legal doctrine that is controlling here: *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). The situation facing Panhandle Eastern Pipe Line Company ("Panhandle") in 1948, and how it thereafter succeeded lawfully to avoid the hazards of continuing FPC rate control, are summarized below.

Panhandle owned 97,000 acres of gas leaseholds in the lush Hugoton Field in Kansas, which acreage had cost Panhandle very little. The leases were in areas sufficiently well proven to make possible an estimate that Panhandle's holdings covered approximately 700 billion cubic feet of natural gas—about 12% of Panhandle's total gas reserves.

To secure FPC certificates of public convenience and necessity for construction of pipeline facilities, Panhandle represented that gas from its Hugoton Field leases would be available as a source of gas supply for those facilities.

Some years earlier, the FPC had prevailed upon the Supreme Court to hold, in *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581 (1945), that an interstate gas transmission company must include its gas producing properties in its rate base at cost and can realize

4398

a return on those assets of only around 6% per annum. This meant that Colorado Interstate practically had to give its gas away at a fraction of a cent per Mcf. Two years later, in *Interstate Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1947), FPC persuaded the Supreme Court to extend the rule in *Colorado Interstate* to any gas-producing "affiliate" of an interstate gas transmission company.

Panhandle had no difficulty reading the handwriting on the wall: If it ever produced gas from its Hugoton Field leases and transported that gas in interstate commerce, it would fall into the same trap that had caught Colorado Interstate.

(4398)

So Panhandle adopted and implemented a perfectly lawful program: Panhandle organized a subsidiary, Hugoton Production Company ("Hugoton") and transferred to that subsidiary Panhandle's 97,000 acres of Hugoton Field lease-holds, together with some working capital. In exchange, Panhandle received all of Hugoton's stock plus an option to purchase, on and after January 1, 1965, all or part of the gas produced from those lands.

Simultaneously with the lease transfer, Panhandle declared a dividend of Hugoton stock to its (Panhandle's) stockholders. Thereby, Panhandle was able to preserve for its owners the full market value of the Hugoton Field leases, which value the FPC would, in effect, have confiscated if it were able to obtain jurisdiction over the lease transfer transaction.

4399

FPC objected and sought to enjoin this lawful means of avoiding its jurisdiction; but to no avail. The Supreme Court scrutinized the transaction with great care, but could find nothing in the Natural Gas Act which endows the FPC with jurisdiction over transfers of mineral leases.

We have dealt with the *Panhandle* case at some length in this Introduction because the underlying circumstances there are in many ways parallel with those presented here.

Background Facts in This Case

The Rayne Field in Acadia Parish, Louisiana, was discovered by Continental in 1953. It turned out to be a major gas-condensate find; total recoverable gas reserves are estimated to be about a trillion cubic feet. Continental et al. owned leases covering most of the productive area.

In June 1954, shortly after the Rayne Field was discovered, the Supreme Court handed down its historic decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672. Continental et al. were unwilling to throw their exceed-

ingly valuable leasehold interests in the Rayne Field into the chaotic maelstrom created by *Phillips*; so they did nothing during the next two and a half years which could in any way subject any gas produced from that field to FPC jurisdiction.

4400

After many months, the hectic aftermath of *Phillips* subsided. It then began to appear that FPC was genuinely striving to be fair in certifying new contracts for sales of gas. Accordingly, on February 1, 1957, Continental et al. entered into tentative contracts to sell gas from the Rayne Field to Texas Eastern. Appropriate applications for certification were thereupon filed with the Commission by Continental et al. and by Texas Eastern.

But in 1958, before the Commission took action on the pending certificate applications, the Court of Appeals for the Third Circuit upset the gas sales contracts in the "*CATCO*" case, *Public Service Commission of New York v. Federal Power Commission*, 257 F. 2d 717; and it seemed likely that this result would be sustained by the Supreme Court, as, indeed, it was in 1959 *sub nom. Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378. That was enough for Continental et al. Just as Panhandle had been able to read the handwriting on the wall in 1948, so Continental et al. were able to read it ten years later. They rescinded their tentative gas-sales contracts with Texas Eastern—as they had the legal right to do—and filed notices of withdrawal of their certificate applications pending before, but not yet acted upon by, the FPC.

Still, Texas Eastern and its customers and their customers were sorely in need of more gas. The Rayne Field was the largest uncommitted gas field in southern Louisiana,

4401

and it lay only 22 miles from Texas Eastern's main trunk-line system. So Texas Eastern prudently offered to buy outright the Rayne Field leases owned by Continental et al.; and, after protracted, arms-length negotiations, the terms of such a transaction were agreed upon.

There was nothing furtive or wicked, either ethically or legally, about this straightforward business transaction. The effect, of course, would be that FPC could exercise no jurisdiction over the Assignors' transfer of leases, because that was foreclosed by the form and substance of the transaction and by the Supreme Court's determination in the *Panhandle* case. The risk of any subsequent FPC regulatory aberration was assumed by Texas Eastern alone; the Assignors, once they had divested themselves of their leasehold interest, would be completely out of the picture. Thereby, the Assignors were lawfully able to preserve the market value of their valuable leases, just as Panhandle had been able to do with the blessings of the Supreme Court.

The Commission's Opinion No. 378

As we shall demonstrate in the body of this Application for Rehearing, the Commission's Opinion No. 378, issued February 6, 1963, cannot stand because it:

—Ignored the property and mineral laws of the State of Louisiana;

4402

—Went counter to the IRS ruling of January 13, 1959, in violation of the rule of *res judicata*;

—Reversed FPC Presiding Examiner Frazee's correct Decision of June 29, 1962, on the jurisdictional question;

—Repudiated the Commission's own prior Opinion No. 322 of June 23, 1959;

—Repudiated the Commission's own Brief of July 11, 1960, filed in the Court of Appeals;

—Overruled the Court of Appeals' Opinion of December 8, 1960, and disobeyed that appellate court's remand;

—Overruled the U.S. Supreme Court's 1949 decision in the *Panhandle* case;

—Rewrote the Natural Gas Act of 1938 without Congressional sanction;

—Redetermined issues which were precluded from being reconsidered by the established law of the case;

—Determined issues against Continental et al., *in absentia* and without notice, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States;

—Assumed authority, which no court (let alone an administrative agency) possesses, to compel parties to rescind a lawful, binding, and consummated transaction; and

4403

—Directed Continental et al. and Texas Eastern to agree upon and enter into completely new and different contractual relationships, which direction is impossible to comply with, is a legal nullity, and is beyond the authority of this Commission or of any other administrative or judicial tribunal.

4404

I.

THE COMMISSION HAS NO JURISDICTION OVER THE SALE BY CONTINENTAL ET AL. TO TEXAS EASTERN OF LEASEHOLD RIGHTS AND INTERESTS IN THE WAYNE FIELD.

A. RELEVANT FACTS

By Lease Sale Agreement dated December 4, 1958, Continental et al. agreed to sell to Texas Eastern, and it agreed

(4404)

to buy, leasehold rights and interests owned by Continental et al. in the Rayne Field, Acadia Parish, Louisiana. The stipulated sale price was approximately \$134.4 million, of which \$12.4 million was to be paid in cash at the closing, the remainder to be evidenced by four series of promissory notes totaling \$122.0 million, payable in monthly installments over a period of sixteen years.

The agreed shares of the Assignors in the proceeds of the sale were approximately as follows: Continental 55.9%, Sun 31.7%, Marr 8.4% and General Crude 4.0%.

The sale was made subject to four conditions, all of which were subsequently fulfilled:

- (1) Texas Eastern's approval of Assignors' titles.
- (2) Assignors' receiving an IRS ruling that gains realized by Assignors from the transaction would be considered as long-term capital gains for income tax purposes. IRS issued such a ruling on January 13, 1959.

4405

and in so doing necessarily found the proposed transaction to be a *bona fide* sale of realty interests which Assignors had owned for more than six months.

- (3) Issuance by the FPC of such satisfactory certificate of public convenience and necessity as Texas Eastern might require to enable it to construct and operate the necessary facilities (a 22-mile pipeline spur and a compressor station) to take gas from the Rayne Field. Such certification was granted to Texas Eastern in the Commission's Order No. 322, issued June 23, 1959.
- (4) The Assignors' obtaining unconditional dismissals or permitted withdrawals of FPC certification proceedings with respect to conventional gas sales arrangements which the parties had proposed early in 1957, but which they had thereafter can-

(4407)

celled and abandoned. Continental's notice of withdrawal was permitted in the Commission's Opinion No. 322 of June 23, 1959. Withdrawals by Sun, Marr and General Crude had been permitted several months earlier.

4406

On July 27, 1959, the lease sale transaction was closed. Essential features of the transaction are outlined below.

An Assignment and Conveyance was executed, delivered and duly recorded. Therein, the Assignors assigned and conveyed to Texas Eastern extensive leasehold rights and interests in the Rayne Field. Such rights and interests were listed in an exhibit to the Assignment and Conveyance, and the mere enumeration of them covers 60 printed pages. Also transferred to Texas Eastern were Assignors' facilities and equipment pertaining to the Rayne Field operations, and the inventory of those items runs on for an additional 35 printed pages.

In the Assignment and Conveyance, the Assignors reserved:

- (1) Deep rights below the base of the Nodosaria "A" sand, the deepest horizon (13,650 to 13,890 feet below the surface) that had, up to then, proven productive in the Rayne Field.
- (2) Oil and other minerals, except gas and condensate.
- (3) A limited production payment payable out of liquids recovered from the raw gas production of the properties until specified

4407

quantities of gas have been produced, whereupon the production payment obligation ceases.

At the closing on July 27, 1959, Texas Eastern made the \$12.4 million down payment and delivered to each Assignor the 16 promissory notes to which it or he was entitled.

(4407)

evidencing, in the aggregate, the \$122.0 million unpaid balance of the purchase price.

The promissory notes delivered to each Assignor were secured by an Act of Mortgage and Pledge of the assets Texas Eastern had acquired. These instruments were also duly recorded in accordance with Louisiana law.

A Management Agreement was entered into, providing for management of the Rayne Field operations by Continental as agent for Texas Eastern. The reasons for this arrangement were set out in the preambles to the instrument: Continental had, as Operator, developed the Rayne Field; Texas Eastern had no experience in such operations in that area; "and due to extremely high pressure in the reservoirs and the hazards encountered by an inexperienced Operator, [Texas Eastern] has acquired such leasehold interests from [Continental et al.] with the understanding that it could obtain the experienced and capable management of such properties by Continental."

Since July 27, 1959, Texas Eastern has purchased additional leasehold rights and interests in the Rayne Field

4408

from owners other than Continental et al. on substantially similar terms.

The lease sale transaction of July 27, 1959, has to date been carried out by the parties in compliance with their contractual obligations.

In August 1959 Texas Eastern connected the Rayne Field to its system and has since withdrawn over 165 billion cubic feet of gas.

Continental et al. have received the payments due them on their promissory notes in an aggregate sum of approximately \$24.6 million, so that, inclusive of the \$12.4 million down payment, upwards of 27.5% of the total purchase price has now been paid. The Assignors' gains from their

sale of leasehold rights and interests have been accorded long-term capital gain treatment by the IRS in consonance with its tax ruling of January 13, 1959.

B. THE LEGAL EFFECT OF THE TRANSACTION

There can be no question that the transaction of July 27, 1959, effectively divested the Assignors of their Rayne Field leasehold rights and interests and lodged those rights and interests in Texas Eastern. Continental et al. did not sell natural gas; they sold only rights and interests in realty.

In Louisiana, as elsewhere, an oil and gas lease vests the holder thereof with the exclusive right to go

4409

upon the land covered by the lease; there to explore for and produce oil and gas; and to remove and dispose of any such production. Such a lease does not convey title to any subsurface minerals or to any oil or gas "in bulk" or "in place"; nor does the lessee thereby acquire any such commodity as oil or gas.

Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (1920);

Wright v. Imperial Oil & Gas Products Co., 177 La. 482, 148 So. 685 (1933);

Dixon v. American Liberty Oil Co., 226 La. 911, 77 So. 2d 533 (1955);

Regan v. Murphy, 235 La. 529, 105 Sp. 2d 210 (1958);

Elkins v. Townsend, 296 F. 2d 172 (5th Cir. 1961);

McCoy v. United Gas Public Service Co., 57 F. Supp. 444 (D.C. W.D. La., 1932);

Williams and Meyers, Oil and Gas Law (1959 ed.), S 202.1, Vol. 1, p. 21.

(4409)

Oil and gas can become commodities, and therefore a subject of commerce, only after they have been extracted from the earth and reduced to possession. *Pennsylvania v. West Virginia*, 262 U.S. 553, 586 (1923).

Section 1105 of Title 9 of the Louisiana Revised Statutes classifies oil and gas leases as "real rights and incorporeal immovable property" and provides that owners of oil and gas leases "shall have the benefit of all laws relating to the owners of real rights in immovable property or real estate."

A Louisiana oil and gas lease, if duly recorded, is binding as to third parties (La. R.S. 9:2721). The

4410

owner of such a lease may underlease or cede his lease to another (La. Civ. Code, Tit. IX, Art. 2725), and acts of transfer of such leases, when duly recorded, accord protection to the subsequent holder (Id. Tit. IV, Arts. 2251-2266).

Thus, in our case, when Continental et al, executed and delivered the Assignment and Conveyance of July 27, 1959, and the same was duly recorded, they divested themselves of all leasehold rights and interests covered by the instrument, and those rights and interests became vested in Texas Eastern. The latter thereupon acquired "real rights and incorporeal immovable property" and became entitled to "the benefit of all laws relating to the owners of real rights in immovable property or real estate"; but Texas Eastern did not thereby acquire a single cubic foot of natural gas, and Continental et al. did not thereby sell any.

The term "natural gas" is expressly defined in Sec. 2(5) of the Natural Gas Act as "either natural gas unmixed, or any mixture of natural and artificial gas." The normal meaning of "natural gas" has been held to be "a mixture of gaseous hydrocarbons found in nature." *Deep South*

Oil Co. v. FPC, 247 F. 2d 822, 888 (5th Cir. 1957) cert. den. *sub norm.*; *Humble Oil & Refining Co. v. FPC*, 355 U.S. 930 (1958).

Very little perception is required to understand that "real rights and incorporeal immovable property" on the one

4411

hand, and "a mixture of gaseous hydrocarbons found in nature" on the other, are entirely different things.

C. IT IS FIRMLY ESTABLISHED THAT THE COMMISSION POSSESSES NO JURISDICTION OVER PURCHASES OR SALES OF LEASEHOLD INTERESTS

1. *Judicial decisions*

The leading case is *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. The sole problem there considered was (337 U.S. at 499):

"... a problem involving the scope of the power over gas reserves of a natural-gas company given to the Federal Power Commission by the Natural Gas Act . . . Specifically the question to be decided is whether a natural-gas company; subject to the Act, may sell the leases covering an estimated twelve percent of its total gas reserves without the approval and contrary to an order of the Commission."

The Supreme Court held that the sale of leaseholds by a natural-gas company was not a sale of natural gas in interstate commerce subject to the jurisdiction of the Commission, but was an "activity related to the production and gathering of natural gas and beyond the coverage of the Act." In holding that the transfer of leasehold interests by natural-gas companies came within the production exemption of Section 1(b) of the Act, the Court noted that

(4411)

"the Natural Gas Act did not envisage Federal regulation of the entire natural-

4412

gas field to the limit of constitutional power"" and then stated. (337 U.S. at pp. 504-505, footnotes omitted):

"The Commission seeks to distinguish between the activities of production and gathering, such as drilling, spacing wells, or collecting gas, and the facilities such as reserves and gas leases used therefor and argues that only the former were excluded from the coverage of the Act. In support of this position it is pointed out that the section specifically exempts both the local distribution and the facilities used therefor while it makes no mention of the facilities used for production or gathering. In the face of the unambiguous language of the Act and its legislative background, we cannot ascribe such a narrow meaning to the words, 'the production or gathering of natural gas.' In *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 603, 89 L.ed. 1206, 1223, 65 S. Ct. 829, we said that this phrase comprehended the producing properties and gathering facilities of a natural gas company. *We now adhere to this natural and clear meaning of the words and their obvious expression of congressional intent. Of course leases are an essential part of production.*" (Emphasis added)

* In *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961), the Court noted:

"... Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation."

The Court reviewed the legislative history of the Natural Gas Act** and rejected the Commission's contention that it was

4413

vested with jurisdiction over the transfer of leases by Sections 4, 5 and 7 of the Act, stating (337 U.S. at pp. 508-515, footnotes omitted):

"Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms.

"To accept these arguments springing from power to allow interstate service, fix rates and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states.

"The District Court found as a fact, and the finding is undisputed by the Commission, that, 'It has been

** The pertinent legislative history of the Act is set forth in the footnotes at 337 U.S. 509-516. In addition, a comprehensive review of the bills from 1935 through 1938 which led to the passage of the Act appears in 44 Georgetown Law Journal, pp. 695-723 (1956). As there noted, during Congressional consideration in 1935, all references to "production" were systematically and completely eliminated from the jurisdictional provisions of the proposed bill to regulate natural gas (Title III) but similar provisions as to the generation of electric energy remained in the bill (Title II) which ultimately became the Federal Power Act. "It can hardly be supposed that this deletion was meaningless." 44 Georgetown Law Journal 700-701.

the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfer of such leases.' Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. If possible all sections of the Act must be reconciled so as to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power."

During the fourteen years since the rendition of the *Panhandle* decision, its authority has never been dimmed or doubted by any court. *Panhandle* has been consistently

4414

followed or cited with approval in the following, among other, subsequent cases:

Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672, 678 (1954), affirming *State of Wisconsin v. PFC*, 205 F. 2d 706, 711 (D. C. Cir. 1953);

Deep South Oil Co. of Texas v. PFC, 247 F. 2d 882, 893 (5th Cir. 1957);

Saturn Oil & Gas Co. v. FPC, 250 F. 2d 61, 68 (10th Cir. 1957);

Continental Oil Co. v. FPC, 266 F. 2d 208, 210 (5th Cir. 1959);

Public Service Commission of the State of New York v. FPC, 287 F. 2d 143, 145, 146 (D. C. Cir. 1960);

Hunt v. FPC. 306 F. 2d 334, 345 (5th Cir. 1962);

FPC v. J. M. Huber Corp., 133 F. Supp. 479, 484 (D. C. N.J. 1955);

Emerald Coal & Coke Co. v. Equitable Gas Co., 378 Pa. 107 A. 2d 734, 737. (1954).

2. FPC actions

Up to February 6, 1963, the Commission likewise consistently recognized its utter lack of jurisdiction over the sale, purchase or transfer of leasehold interests by natural-gas companies.

As pointed out by the Supreme Court in *Panhandle*, "for over ten years [prior to 1949] the Commission has never claimed the right to regulate dealings in gas acreage." (337 U.S. at p. 513.) And at the conclusion of its *Panhandle* opinion, the Supreme Court told the Commission exactly what it could do if it wished to obtain such authority (337 U.S. at pp. 515-516):

"If the Commission is of the opinion that it should have power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact."

4415

The Commission has done just that, not simply once, but once each year for the past twelve years. In each of its Annual Reports to Congress for the years 1951 through 1962, the Commission has advocated an amendment to Section 7 of the Natural Gas Act which would vest FPC with jurisdiction over transfers of leaseholds by natural-gas companies.* Congress has turned a deaf ear to this full dozen of pleas for the very power which the Commission clearly does not possess, but which it suddenly decided to usurp, if it could, in this case.

"Great weight" must be given to an agency's consistent interpretation of the law it administers, especially where

(4415)

the agency has sought to have the law amended, but Congress has declined to do so and has thereby acquiesced in the agency's historical interpretation.

United States v. Bergh, 352 U.S. 40, 47 (1956);

Gas Service Company v. Federal Power Commission, 282 F. 2d 496, 499 (D. C. Cir. 1960);

Mississippi Valley Gas Co. v. Federal Power Commission, 294 F. 2d 588, 592 (5th Cir. 1961).

4416

D. THE COMMISSION'S ACTIONS IN THESE PROCEEDINGS WITH RESPECT TO JURISDICTION OVER THE RAYNE FIELD LEASE SALE

The Commission's assertion, on February 6, 1963, of jurisdictional authority over the sale of leasehold rights and interests in the Rayne Field was all the more surprising because such assertion came as a complete afterthought.

The Commission was apprised of the parties' intention to enter into the leasehold sale transaction shortly after it was agreed to on December 4, 1958. From that time on until February 6, 1963—a period of more than four years—every step the Commission took in these proceedings was diametrically contrary to the position it now embraces in Opinion No. 378.

A filing made by Texas Eastern in these proceedings on December 15, 1958, advised the Commission that Texas Eastern had acquired the right to purchase the working interests of Continental et al. in the Rayne Field leases, under the terms and conditions of the Lease Sale Agreement dated December 4, 1958. By FPC order issued Febru-

* 31 FPC Ann. Rep. 145 (1951); 32 FPC Ann. Rep. 152 (1952); 33 FPC Ann. Rep. 125 (1953); 34 FPC Ann. Rep. 170 (1954); 35 FPC Ann. Rep. 182 (1955); 36 FPC Ann. Rep. 19 (1956); 37 FPC Ann. Rep. 25 (1957); 38 FPC Ann. Rep. 18 (1958); 39 FPC Ann. Rep. 21 (1959); 40 FPC Ann. Rep. 19 (1960); 41 FPC Ann. Rep. 3 (1961); 42 FPC Ann. Rep. 14 (1962).

ary 19, 1959, these proceedings were reopened for reception of evidence upon the Lease Sale Agreement of December 4, 1958, and the proposed Texas Eastern Rayne Field facilities. Hearings in the reopened proceedings were held in March 1959; and by FPC order issued April 6, 1959, intermediate decision procedure was dispensed with and the case was brought before the Commission itself for decision. At no time during any

4417

of these proceedings did the Commission so much as hint that it might possess or exercise jurisdiction over the Rayne Field leasehold conveyances.

In its comprehensive Opinion No. 322, issued herein on June 23, 1959, the Commission granted Texas Eastern's application for certification of the facilities—i.e., the 22-mile spur line and a compressor plant—required by Texas Eastern to take gas from the Rayne Field. In the course of that Opinion, the Commission was at pains to point out (mimeo. pp. 5-6; 21 FPC 860 at p. 864):

“Texas Eastern has not filed an application for a certificate authorizing acquisition of the Rayne Field leases *and we have no authority to issue such a certificate.*” (Emphasis supplied.)

The New York Public Service Commission (“PSC”), an intervenor, took Opinion No. 322 up for review before the U.S. Court of Appeals for the District of Columbia Circuit. The Commission there adhered to its position that it lacked jurisdiction over the Rayne Field leasehold sale. Following are excerpts from the brief, dated July 11, 1960, filed by the Commission with the Court of Appeals:

“The Commission’s order does not authorize the purchase of the leases—*undisputably such authorization is outside its jurisdiction (infra, p. 17).* But petitioner complains that . . . the Commission has given a

'blessing' to the price Texas Eastern proposes to pay for the leaseholds *in that non-jurisdictional transaction.*" (p. 2; emphasis supplied.)

4418

"We discuss the want of Commission jurisdiction over the transfer of leases at p. 17, *infra.*" (p. 3, footnote 8.)

"... the Commission ... held in the opinion accompanying the order complained of ... :

'Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate.'

"... But the controversy here really stems from PSC's assumption that the Commission should treat a *nonjurisdictional sale of leases* as if it were a jurisdictional sale of gas." (p. 16; emphasis supplied.)

"A. *The Act Does Not Require that Texas Eastern secure a Certificate Authorizing Acquisition of the Leases.*

"Section 7(c) of the Act requires natural-gas companies to secure a certificate of public convenience and necessity before they 'acquire' any 'facilities' for jurisdictional transportation or sale of natural gas. The Supreme Court, in *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), held that while even undeveloped leases might be 'facilities,' they are not 'facilities subject to the jurisdiction of the Commission' because Section 1(b) exempts 'production and gathering' from coverage of the Act.³¹ ... PSC has not challenged the Commission's position that Texas Eastern is free to acquire these developed (but hitherto unoperated) leases without certificate authority.

³¹ 'Of course leases are an essential part of production.' 337 U.S. at 505. '[T]he transfer of undeveloped gas leases is an activity related to the

4419

production and gathering of natural gas and beyond the coverage of the Act.' 337 U.S. at 515." (p. 17; emphasis supplied.)

• • • • •
"B. The Act Does Not Require the Assignors to Secure Either Abandonment Permission or Certificate Authority to Sell Their Leases.

"The abandonment provisions of the Act, Section 7(b), were construed in *Panhandle, supra*. Accepting that decision, no party has suggested that the Rayne Field leases could not be freely abandoned. *Panhandle* similarly exempts the sale of leases from the certificate coverage of the Act." (p. 18; emphasis supplied.)

• • • • •
 "The Commission lacks the certificate power to regulate the transaction between Texas Eastern and its assignors." (p. 20.)

• • • • •
"The Commission realized that by the device of selling their leases the assignors escaped regulation of their revenue from the Rayne Field." (p. 26; emphasis supplied.)

The Court of Appeals disposed of PSC's appeal in an opinion rendered on December 8, 1960: *Public Service Commission of the State of New York v. Federal Power Commission*, 287 F. 2d 143. As to the Commission's lack of jurisdiction over Continental et al., as Assignors of the Rayne Field leases, the appellate court held as follows (287 F. 2d at pp. 145, 146):

4420

"Instead of purchasing gas in the usual manner from the four producer-sellers, Texas Eastern proposed to acquire leasehold interests....

"The significance of this change in the form of the transaction, at least from the standpoint of the pro-

ducer-sellers, is manifest. Sales of natural gas by an independent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 674 (1954). But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).

.

"It is of no importance here that the transactions by which Texas Eastern proposed to acquire gas will themselves be, by virtue of the change in form, beyond the regulatory control of the Commission."

That settled—or at least should have settled—the jurisdictional question, so far as Continental et al. were concerned. We shall have more to say on this subject later.

The Court of Appeals went on to remand the matter to the Commission "for further proceedings not inconsistent with the opinion of this Court" (287 F. 2d at p. 146). The fact that the Commission disobeyed this judicial mandate will also subsequently be discussed. The important point to be noted here is that the Court of Appeals ruled flatly and finally, on the authority of *Panhandle*, that the Commission lacked jurisdiction over the leasehold sale by Continental et al.

4421

In seeming compliance with the Court of Appeals' mandate, the Commission on July 14, 1961, issued an "Order Reopening Proceedings, Prescribing Procedures and Fixing Date of Hearing." This, too, will shortly be considered at some length. The July 14, 1961, Order is noteworthy for purposes of the point now being discussed—namely, lack of FPC jurisdiction over Continental et al. as assignors of the Rayne Field leases—because that Order was completely silent concerning any such issue.

Pursuant to the Order of July 14, 1961, further hearings

were held before Presiding Examiner Frazee and were concluded on December 7, 1961. He handed down his Decision on June 29, 1962, in which he adhered to the established proposition that the Commission possesses no jurisdiction over the Assignors of the Rayne Field leases. (Decision pp. 7-11.)

Exceptions to Examiner Frazee's Decision were argued before the Commission on November 29, 1962, and on February 6, 1963, it issued its Opinion No. 373, to which this Application for Rehearing is addressed. Opinion No. 378 and the accompanying Further Findings and Order contain many grievous errors. For the present, we shall confine ourselves to the errors pertaining to the Commission's assertion of jurisdiction over the sale of leasehold rights and interests in the Rayne Field. Other errors will be specified under subsequent sections of this Application.

4422

E. ERRORS OF THE COMMISSION IN CONNECTION WITH ITS ASSERTION OF JURISDICTION OVER THE SALE OF LEASEHOLD RIGHTS AND INTERESTS.

1. *The Commission erred in confusing the parties' abandoned proposal to make conventional sales of gas with the lease sale transaction ultimately consummated.*

It is true that on February 1, 1957, Continental et al. proposed to sell gas from the Rayne Field to Texas Eastern under conventional gas sales contracts. Those tentative arrangements, however, were rescinded, cancelled and abandoned. Nothing came of them; they never materialized; they died before they were born.

The original proposals, therefore, no longer have any real bearing on this case. We concur wholeheartedly with the representation made by the Commission in its brief of July 11, 1960, to the Court of Appeals (p. 3; emphasis supplied):

(4422)

"It is true that initially the four assignors [Continental et al.] planned to produce and operate the field themselves. They contracted to sell to Texas Eastern and applied for certificates of convenience and necessity. Prior to Commission action, however, they terminated the contracts and Texas Eastern negotiated a lease transfer arrangement instead. *So far as we can discern, the original program . . . has little bearing on the issues before this Court.*"

Now that the Commission has changed its mind, it has also changed its tune. At the outset, Opinion No. 378 states that these proceedings "arose from applications filed by Texas Eastern and Continental Oil Company for certificates

4423

of public convenience and necessity under Section 7 of the Natural Gas Act." This refers, of course, to the abortive original gas sale proposal. The second paragraph in Opinion No. 378 is devoted largely to a description of the terms of the tentative conventional sale of gas that never took place. Having laid such a predicate, Opinion No. 378 later asserts:

"In considering the question of the Commission's jurisdiction over the in-place sale of the Rayne Field gas to Texas Eastern, it must be kept in mind that the original sales contract between the producers and Texas Eastern was clearly subject to FPC jurisdiction and not subject to state regulation." (p. 6.)

"As will be recalled, Texas Eastern shifted from a straight purchase of gas to the lease sale arrangement." (p. 10.)

In short, if the parties had sold gas, the Commission would have had jurisdiction; hence, the Commission must possess jurisdiction over this assignment of leases. The fallacy in such reasoning is apparent.

2. The Commission repeatedly erred by misdescribing and misconstruing the lease sale transaction, the status of the parties to it, and its legal effect.

In the course of Opinion No. 378, the transaction contemplated by the Lease Sale Agreement of December 4, 1958, and consummated by execution, delivery and recording of the Assignment and Conveyance of July 27, 1959, is misdescribed and misconstrued time and again, viz:

4424

—As a transfer of a “supply of gas” or “gas supply” (pp. 1, 4);

—As a “sale” or “sales” of “gas,” “natural gas” or “gas reserves” (pp. 4, 8, 11);

—As an “in-place sale” of “gas” or “gas reserves” (pp. 6, 9);

—As a means by which Continental et al. “transferred natural gas to Texas Eastern” (p. 6);

—As a means by which “gas . . . was sold in bulk (p. 6);

—As “in effect, a sale of a relatively well defined block of gas”; “a sale of a defined block of gas” (O'Connor, C., concurring).

By similar word-magic, Opinion No. 378 transforms Continental et al. from Assignors of leasehold rights and interests into “producers” and “independent producers of natural gas” (pp. 6, 9, 11).

When it engaged in this game of semantics, the Commission apparently forgot that it had previously told just the opposite story to the Court of Appeals. (FPC Brief of July 11, 1960, p. 3; emphasis supplied):

"PSC's complaint centers about *the sale of leases*. It does *not* concern a purchase of gas in place within the underground reservoir (*which Louisiana mineral law does not recognize*). *Not does it involve a contract to sell gas as produced by the assignors.*"

Footnote 7 on the same page of the Commission's brief explained:

4425

"We use 'assignors' for the sake of clarity. PSC refers to the companies as 'producers' and it is true that they are elsewhere engaged in production. . . . As regards Rayne Field they might fairly be characterized the 'developpers'; but they will not produce the gas whose cost is the bone of contention in this case."

In an attempt to justify calling white black, and *vice versa*, Opinion No. 378 pretends that the Lease Sale Agreement and the Assignment and Conveyance did not have the legal effect with which they are endowed by the law of Louisiana. Although Continental et al. thereby irrevocably divested themselves of "real rights and incorporeal immovable property," and not one whiff of "natural gas" (see *ante*, pp. 14-16), the Opinion characterizes the lease sale transaction as follows:

—"technically in the form of leasehold transaction" (p. 4);

—"in form a lease transfer," but that was only the "label of the transaction"; not its "essence" (p. 6);

—having an "effect" that "resembles the ordinary sale of gas" (p. 6);

—a "form" that may not be exalted over "substance"; a mere exercise in "the technicalities of contract draftsmanship" (p. 9);

—an “attempt to disguise a transaction which in effect is a sale of gas by casting it in the form of a sale of leases” (p. 10).

4426

These are brave words, but, in the light of Louisiana property and mineral law, they are clearly nothing more.

None of the five features of the lease sale transaction listed on page 7 of Opinion No. 378 could convert that transfer of “real rights and incorporeal immovable property” into a sale of “natural gas”:

(1) Reservation of rights in deep, untested strata and in oil and other minerals did not and could not transmute the remaining leasehold rights and interests into gas. How many additional millions of dollars would the Commission like Texas Eastern to pay for leasehold interests in unproved rock formations some two and a half miles below the surface? Or for oil and other minerals over which FPC has no jurisdiction?

(2) The reserved production payment, payable out of recovered hydrocarbon liquids, relieved Texas Eastern of all operating costs (except for drilling additional wells), and provided Texas Eastern with the prospect of substantial future income after the production payment is satisfied. Again, how many more millions does the Commission wish Texas Eastern to pay for non-jurisdiction condensate production?

(3) The fact that the promissory notes Texas Eastern delivered to Continental et al. provided that they must be paid off more rapidly if gas should be produced from the Rayne Field at an accelerated rate was necessary to

4427

protect the Assignors' security. If Texas Eastern were, by stepped-up production, to deplete the field in less than

(4427)

sixteen years, the late maturing promissory notes would be unsecured. Default in payment of such notes would leave Continental et al. with no remedy; they could not recover the amounts due them by foreclosing their mortgages on depleted gas properties. This provision was not inserted in the notes "so that Texas Eastern's payments would be geared to production," as the Commission erroneously asserts; it was designed simply to assure adequate collateral security backing up Texas Eastern's note obligations. Moreover, there is no way by which Texas Eastern's down payment of the not inconsiderable sum of \$12.4 million can be "geared to production."

(4) The reasons for the Management Agreement are recited in the preambles to that document (see *ante*, p. 13). It has no bearing whatever on the question of whether or not the lease sale was a lease sale.

(5) The interposition of Louisiana Gas Corporation as obligor shielded Texas Eastern from having "any liability for the notes on its books" (FPC Opinion No. 322, issued June 23, 1959, mimeo. p. 10; 21 FPC at p. 867). "However, it is expressly provided that Texas Eastern does not assume any personal liability on the notes or agree to pay and deficiency in the event of foreclosure" (Id., mimeo. p. 7; 21 FPC at p. 865). As the Commission took pains to explain in

4428

footnote 13 on page 5 of its Brief of July 11, 1960, to the Court of Appeals:

"Louisiana Gas was created to serve as an intermediary . . . There was evidence that the device of transferring oil and gas leases through an intermediary corporation is not peculiar to the instant acquisition (R. 1636-1638)."

What significance, then, can employment of this non-peculiar corporate device have upon the legal validity of the Rayne Field lease transfer?

After the Rayne Field had been discovered and developed, Continental et al. could profit from their successful venture in a number of different and distinct lawful ways. They could sell the gas, as produced, to an interstate transmission company such as Texas Eastern. They contemplated taking that course at one time, but later decided against it. A second alternative was to sell Rayne Field gas production for consumption wholly within the State of Louisiana. That would have eliminated any possibility of FPC price controls—and would also have meant a shortage of gas for Texas Eastern and those whom it served. A third alternative was to sell the Rayne Field leases to Texas Eastern. That is the approach ultimately adopted, because, among other things, it afforded Continental et al. more favorable tax treatment and it also lay beyond FPC's jurisdictional reach.

4429

The fact that the Commission wishes the parties had chose alternative No. 1 instead of No. 3 is immaterial. Such wishful thinking can neither invalidate the lawful and binding lease conveyance nor make it something else.

3. The Commission erred in finding the Rayne Field lease sale transaction to have been a sale of natural gas for resale in interstate commerce.

Specifically, the Commission erred when it opinioned and found as follows in Opinion No. 378:

“We have jurisdiction over this transaction because by it the producers transferred natural gas to Texas Eastern for resale by Texas Eastern in the interstate market” (p. 6).

"Likewise, the sale of gas (or reserves) made under the circumstances here involved by the producers to Texas Eastern for transportation in its pipeline is a sale of gas for resale in interstate commerce and is subject to our jurisdiction" (pp. 8-9).

"Second, I conclude this transaction is 'in interstate commerce' because, and solely because, the necessary effect of this sale to an interstate pipeline is to place this gas into the stream or pattern of interstate commerce" (O'Connor, C., concurring).

"The Commission further finds:

• • • • •
"(2) The Lease Sale Agreement referred to above represents sales of natural gas for resale in interstate commerce, which are subject to our jurisdiction under the Natural Gas Act . . .

"(3) Continental, Sun, Marr and General Crude have not obtained certificates or filed rate schedules in connection with their sales of natural gas subject to the jurisdiction of the Commission . . ." (p. 11).

4430

These erroneous pronouncements are based, it would seem, on the circumstances that: (1) Continental et al. presumably knew what would become of the gas Texas Eastern would withdraw from its leases in the Rayne Field after Texas Eastern acquired such leases, and (2) after its leasehold acquisition, Texas Eastern actually did transport and sell for resale in interstate commerce the gas Texas Eastern produced from its leases in the Rayne Field.

The trouble with these pronouncements is that neither the Assignors' presumptions (or even their knowledge) before the lease sale transaction took place on July 27, 1959, nor the acts of Texas Eastern thereafter, could in any way affect the nature or legal effect of the leasehold conveyances.

Under Louisiana law, Continental et al. did not own any

gas in the Rayne Field (see authorities cited *ante*, p. 15). Prior to the time when Assignors assigned and conveyed their Rayne Field leasehold rights and interests to Texas Eastern, Continental et al. had not dedicated or committed any Rayne Field gas to interstate commerce, nor had any of that gas been transported or sold in such commerce. All that Continental et al. did was to assign and convey "real rights and incorporeal immovable property." Such conveyances likewise failed to vest Texas Eastern with title to any gas, but merely gave Texas Eastern the exclusive right to explore for and produce gas on the properties,

4431

reduce such gas to possession, and then—and only then—to own such gas and dispose of it *as Texas Eastern might see fit*. The leasehold sale was not, and by its very nature could not be, a sale in interstate commerce; it affected only rights and interests in real property located wholly within the State of Louisiana.

In August 1959, some weeks after Texas Eastern acquired the Rayne Field, it began to transport gas from that field in interstate commerce, and it began to sell such gas for resale in such commerce. These acts on the part of Texas Eastern did not, and could not, retroactively transform the Assignors of the leases into producers or interstate sellers of gas. They didn't own the gas when it was produced; they didn't produce it; they didn't transport it; and they didn't sell it.

4. *The Commission erred in misstating the scope of its own prior Opinion.*

In Opinion No. 378, issued on February 6, 1963, the Commission had the following to say about its earlier Opinion No. 322, issued on June 23, 1959:

"In our previous opinion the Commission merely noted without discussion that we had no authority to

(4431)

issue a certificate for the acquisition of the leases (21 FPC at p. 864) . . . It is apparent the issue was hardly considered in the earlier phase of this proceeding; in our opinion, it may be considered at this stage if for no other reason than that the issue was given but passing mention by the Commission . . ." (p. 5).

"In our prior decision we did not hold that we had jurisdiction over this transaction but, in

4432

effect, accepting it as labeled by the parties in granting a certificate to Texas Eastern" (p. 10).

These statements are belied by the Commission's own Brief of July 11, 1960, to the Court of Appeals. (See quoted excerpts, *ante*, pp. 23-25.) After there declaring that the lease sale transaction was "undisputedly outside its [FPC's] jurisdiction"; that it was a "non-jurisdictional transaction"; that there was a "want of Commission jurisdiction over the transfer of leases"; that it was "the Commission's position that Texas Eastern is free to acquire these developed (but hitherto unoperated) leases without certificate authority"; that "*Panhandle* similarly exempts the sale of leases from the certificate coverage of the Act;" and that "The Commission lacks certificate power to regulate the transaction between Texas Eastern and its assignors,"— after all that, the Commission's Brief added this clincher (p. 26):

"The Commission realized that by the device of selling their leases the assignors escaped regulation of their revenue from the Rayne field."

In the fact of these numerous, solemn declarations before the reviewing Court, it is difficult to find any justification for the Commission's now saying that the jurisdiction issue "was hardly considered in the earlier phase of this proceeding."

Examination of Opinion No. 322 itself reveals that it dwelt at length and in detail on every aspect—including

4433

the jurisdictional aspect—of the lease sale transaction. (See mimeo. pp. 2-3, 5-10; 21 FPC at pp. 861-862, 864-867). Said the Commission in that opinion, just before embarking on a comprehensive review of the lease sale terms:

"Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate. However, we have considered all the circumstances pertaining to the company's acquisition of the Rayne Field leases and the effects of this transaction on the need and convenience of the public proposed to be served . . . and we conclude that the company's modified project, as it would include and rely on the acquisition of the Rayne Field leases, is required by the public convenience and necessity and otherwise meets the requirements of Section 7(e) of the Act" (mimeo. pp. 5-6; 21 FPC at p. 864; emphasis supplied).

Opinion No. 322, therefore, reveals internally that the Commission delved deeply into the jurisdictional question at that time. The Commission considered this question good and hard; not "hardly."

5. *The Commission erred in attempting to disparage the Court of Appeals' adjudication.*

In Opinion No. 378, the Commission commented as follows concerning the opinion of the Court of Appeals in *PSC v. FPC*, 287 F. 2d 143, rendered on December 8, 1960:

4434

"The Court, again without discussion, noted that the 'Commission has been held to lack jurisdiction over gas leases' citing FPC v. Panhandle Eastern Pipe Line

Co., 337 U.S. 498. It is apparent the issue was hardly considered in the earlier phase of this proceeding; in our opinion, it may be considered at this stage if for no other reason than that the issue was given but passing mention by the Commission and the Court" (p. 5). "The reviewing court, with discussion, agreed with the Commission on the question of jurisdiction ..." (p. 10).

These dim views of the cerebral processes of Circuit Judges EDGERTON, WASHINGTON and BASTIAN are also belied by the Commission's Brief of July 11, 1960 (see *ante*, pp. 23-25). Quite obviously, the appellate Judges read that Brief, found it to state correctly the law on the subject of FPC jurisdiction over transfers of leases, and held accordingly. The Court included in its short opinion two statements about jurisdiction (287 F. 2d at pp. 145, 146):

"But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1948).

"It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, beyond the regulatory control of the Commission."

4435

These judicial determinations cannot be accurately described as having been delivered "without discussion" or as indicating that the jurisdictional issue "was hardly considered" or "was giving but passing mention" by the Court of Appeals.

To make plausible its design to expand its powers, the Commission has here resorted to the astonishing expedient of belittling and attempting to disparage the Court of Appeals' considered adjudication—the very adjudication which the Commission itself beseeched the Court to render.

6. *The Commission erred in presuming to overrule the Supreme Court's decision in the Panhandle case.*

Opinion No. 378 endeavors, initially, to distinguish *Panhandle* on three grounds, each of which is futile.

The first alleged ground of distinction is stated to be that in *Panhandle* "the leases were undeveloped so that the transfer did not resemble a sale of gas as did the sale of developed leaseholds here" (Opinion No. 378, p. 7). This won't hold water. The leases involved in *Panhandle* may not have been "developed" in the sense that they were fully drilled up; but they had been sufficiently proven so that the gas reserves underlying them could be estimated at "approximately 700 billion cubic feet" (337 U.S. at p. 500) and the high court could find that such leases covered "an estimated twelve per cent of its [Panhandle's] total gas reserves" (Id., at p. 499). The number of wells drilled in a gas field cannot possibly change an assignment of

4436

leases into a sale of natural gas or anything that "resembles" such a sale.

The second asserted ground of distinction is that "the reserves here are connected or are to be connected to an interstate pipeline and are to be sold in interstate commerce while those in *Panhandle* were transferred to a corporation which subsequently sold them in intrastate commerce" (Opinion No. 378, pp. 7-8). This won't do, either. In both the *Panhandle* case and in our case no gas from the transferred leases was going into interstate commerce at or before the time of the transaction. In neither case could the transferee's disposition of gas production after acquiring the leases possibly affect, retroactively, the character of the act of transfer.

The third and final alleged ground of distinction is worded this way: "Also, in the *Panhandle* case the gas

(4436)

reserves passed entirely out of the control of the seller while here the seller retained rights to oil, gas if found other than in particular strata, production payments for liquids, and management of the field" (Opinion No. 378, p. 8). We have already exposed the fallacies underlying these same arguments (*ante*, pp. 32-33). The Commission's concern over Texas Eastern's failure to buy and pay for deep exploration rights and rights to non-jurisdictional oil production was patently devised to point up a difference. However, it turns out to be a difference without a distinction.

4437

The statement that "the seller retained . . . management of the field" just plain isn't so. The "seller" wasn't Continental alone; there were four "sellers"—Continental, Sun, Marr and General Crude, the latter three of whom (besides not being parties to this proceeding) "retained" no "management" of anything. Neither did Continental "retain . . . management of the field"; Continental was employed, as an independent contractor, to act as Texas Eastern's agent in managing the Rayne Field operations, because Continental was best qualified to do so.

Having thus failed to lay the ghost of *Panhandle*, Opinion No. 378 next tries to make the specter go away by denouncing it as bad law (p. 8). The espoused thesis is that *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), in effect overruled *Panhandle*. This cannot be so, because *Phillips* cited *Panhandle* with approval for the very proposition that FPC jurisdiction does not extend to producing "properties" (347 U.S. at p. 678):

"In *Federal Power Com. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505, we observed that 'the natural and clear meaning' of the phrase 'production or gathering of natural gas' is that it encompasses 'the

producing properties and gathering facilities of a natural-gas company.' Similarly, in *Colorado Interstate Gas Co. v. Federal Power Com.*, 324 U.S. 581, 598 . . . we stated that '[t]ransportation and sale do not include production and gathering,' and indicated that the 'production or gathering' exemption applies to the physical facilities, *and properties* used in the production and gathering of natural gas. *Id.*, 324 U.S. 602, 603." (Emphasis supplied.)

4438

Thus, instead of overruling *Panhandle*, as FPC Opinion No. 378 would make it appear, *Phillips* actually reaffirmed the *Panhandle* doctrine.

Opinion No. 378 goes on to argue that *Saturn Oil & Gas Co. v. FPC*, 250 F. 2d 61 (10th Cir. 1957) and *Continental Oil Co., v. FPC*, 266 F. 2d 208 (5th Cir. 1959), cert. den. 361 U.S. 827, which followed *Phillips*, may be deemed to have dealt *Panhandle* further mortal blows. The *Saturn* and *Continental* cases, however, involved conventional sales of natural gas at the wellhead, and the intermediate appellate courts merely held that such sales fell within the ambit of FPC jurisdiction. Neither *Saturn* nor *Continental* had anything to do with transfers of leasehold rights in real property.

In any event, the *Saturn* and *Continental* cases were decided by tribunals inferior to the U.S. Supreme Court and therefore could not conceivably have overruled the highest court in the land. *A fortiori*, a mere administrative agency has no power to overrule a Supreme Court decision, as the Commission has presumed to do in this case.

II.

THE COMMISSION WAS PRECLUDED AS A MATTER OF LAW FROM
RECONSIDERING AND REDETERMINING THE QUESTION OF
JURISDICTION OVER CONTINENTAL ET AL.

A. RELEVANT FACTS

In its Opinion No. 322, issued June 23, 1959, the Commission held that it had no jurisdiction over Assignors' conveyance of the Rayne Field leasehold rights and interests to Texas Eastern. The reasons for this holding and the Commission's position with respect thereto were explained and expounded at length in the Commission's Brief of July 11, 1960, to the District of Columbia Court of Appeals (see quotations *ante*, pp. 23-25).

The Court of Appeals confirmed that the Commission lacked jurisdiction over the Assignors of the Rayne Field leases (287 F. 2d at p. 145):

"But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949)."

And later the Court held that, while such jurisdiction over the Assignors was wanting, this did not prevent FPC regulation of the Assignee, Texas Eastern (287 F. 2d at p. 146; emphasis supplied):

"It is of no importance here that *the transactions by which Texas Eastern proposes to acquire the gas will themselves be . . . beyond the regulatory control of the Commission . . . the Commission's warrant to inquire arises by virtue of its responsibility to regulate the purchaser, regardless of the status of the seller.*"

The Court further held that the Commission had failed to take appropriate action in Texas Eastern's (not the Assignors') certificate proceeding, wherein Texas Eastern was seeking authorization to construct and operate its new Rayne Field facilities—the 22-mile pipeline spur and compressor plant. In this regard, the Court said (287 F. 2d at pp. 145, 146; emphasis supplied):

"It was entirely within the Commission's power to certify the pipeline construction program without passing upon the financial merits of the gas acquisition arrangement. But the language and tenor of the Commission's Opinion and Order appear to confer general approval upon the terms of the acquisition arrangement. Insofar as the Order purports to pass favorably upon the pricing aspects of the gas lease acquisitions, it is, unsupported by substantial evidence in the record, and cannot stand."

"The pipeline construction project and the transactions by which Texas Eastern will dispose of the gas thus acquired are clearly within the Commission's jurisdiction....

"Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant [Texas Eastern]. . . . Or it may reopen the record in the certificate proceeding to permit *Texas Eastern* to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity.

"The Commission's Order of June 23, 1959, is reversed, and the matter remanded to the Commission for further proceedings not inconsistent with the opinion of this court."

Another fuling by a coordinate arm of the United States Government—the Internal Revenue Service—was

completely overlooked in Opinion No. 378. As observed, however, in footnote 5 to the Commission's prior Opinion No. 322 (mimeo. p. 6; 21 FPC at p. 864), one of the conditions precedent specified in the Lease Sale Agreement of December 4, 1958, was:

"receipt by Continental *et al.* from the Internal Revenue Service of a ruling in writing that the gain from the sale of the leasehold interests will be considered a gain from the sale of a capital asset held more than six months under Section 1231 of the Internal Revenue Code of 1954."

The IRS ruling of January 13, 1959, was written by Assistant Commissioner Harold T. Swartz. It reviewed in detail the provisions of the various documents involved in the lease-sale transaction, including the Lease Sale Agreement, the Assignment and Conveyance, the Promissory Notes, the Acts of Mortgage and Pledge, and the Management Agreement. The ruling then concludes, in relevant part, as follows:

"The leasehold rights to be sold to Grantee [Texas Eastern] were acquired by the respective Grantors [Continental *et al.*] in the usual course of business and with the expectation that the oil, gas and mineral deposits discovered thereon would be exploited and sold as produced. All of such rights owned by the respective Grantors have been held for more than six months.

"You have asked that a ruling be issued holding that the gain from the proposed sale shall be recognized under the provisions of section 1231 of the Internal Revenue Code of 1954.

* Sec. 1231 of the IRC applies to depreciable personal property and real property used in trade or business.

4442

"Based on the foregoing, it is held that the gain on the sale of the properties being disposed of will be subject to tax treatment provided by section 1231. . . ."

This Commission knew that Continental et al, had conditioned their lease sale transaction upon the issuance of such an IRS ruling, and after it was issued, the Commission was advised of that fact.

B. THAT THE COMMISSION LACKS JURISDICTION OVER CONTINENTAL ET AL. HAS BEEN JUDICIALLY SETTLED AND IS THE LAW OF THIS CASE.

The Court of Appeals' adjudication, confirming the Commission's holding that it has no jurisdiction over the sale by Continental et al, of their leasehold rights and interests, settled that question finally, and such adjudication thereupon became the law of this case.

Morand Bros. Beverage Co. v. National Labor Rel. Bd., 204 F. 2d 529 (7th Cir. 1953), cert. den. 346 U.S. 909, rehearing den. 346 U.S. 940;

International Union v. Eagle-Picher M. & S. Co., 325 U.S. 335 (1945);

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

The *Moran* case, *supra*, is on all fours with ours. There, the Court of Appeals for the 7th Circuit had reviewed a National Labor Relations Board decision; had expressed its (the Court's) views on a controlling question of law; and had remanded the cause of the NLRB "for further proceedings in conformity with the decision of this court" (190 F. 2d

576, 584). Thereafter, the Board conducted further proceedings, but found itself in disagreement with the Court of Appeals' view of the law. The Board characterized the Court of Appeals' legal concept as having "a kind of superficial appeal, an aura of fairness," which on "more careful examination of the implications of this argument discloses its inherent defects." When the cause came back for review the second time, the Court of Appeals made the following apt statements which bear directly on our situation (204 F. 2d at p. 532; emphasis added):

"The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to that of a United States District Court. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140, 60 S. Ct. 437, 84 L. Ed. 656. That is to say, it is the 'inferior' tribunal, whose decisions, both substantive and, in some instances, adjective, are subject to review and consequent approval or disapproval by the reviewing body. The full implication of this relationship is realized when, as here, the occasion arises for the reviewing court to state what it believes to be the substantive law applicable to a particular controversy but finds that the lower tribunal has not conclusively found the facts to which this law should be applied. The result then, in view of the rule that a reviewing court shall not enter initial findings of fact, is an order remanding the cause 'for further proceedings in conformity

*In our case, the Commission has been somewhat more respectful, but just as disobedient. It has tried to get around the Court of Appeals' holding on the jurisdictional question by characterizing such holding as having been made "without discussion," and by surmising that the jurisdictional issue "was hardly considered" and "was given but passing mention" by the Court.

with the decision of this court. *The pronouncements of the reviewing court are then known in the vernacular as 'the law of the case,' i.e., they are the rules to govern the particular dispute at hand, unless, of course, the decision of the reviewing court is declared erroneous by a tribunal of competent jurisdiction holding a still more superior position in the judicial pyramid. In such a situation it behooves the inferior arbiter to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it. This is so even when it finds itself in well founded disagreement with its reviewer.*

“There is a most salutary reason for our adherence to this doctrine. While we must take care that improper or ill-conceived decisions be held to a minimum, and, when they appear, be quick to supplant them with sound decisions, we must remember that the particular lawsuit must, at sometimes, come to an end. It is conceivable, though admittedly highly improbable, that an individual piece of litigation could be bounced up and down endlessly, from trial to appellate court, merely because of the refusal of the lower body to apply the law as announced by the reviewing one. In short, experience has taught that causes are disposed of most expeditiously when the correction of errors is left to the superior tribunals and those enjoying judicial or administrative inferiority studiously endeavor to comply with the mandate issued to them.”

In the *International Union* case, *supra*, the Labor Board found that companies had discriminated against their employees, who were accordingly ordered reinstated with back pay based on a formula specified by the Board. On review, the Court of Appeals, 8th Circuit, decreed that the Board's order, with minor modifications, should be enforced (119 F. 2d 903). Thereafter, the Labor Board changed its mind and decided that a different back-pay formula should be used. The Board thereupon petitioned the Court of Appeals to vacate that part of its former decree dealing with back

pay and to remand the cause to the Board so that a different method of compensation might be ordered. The Court of Appeals rendered judgment dismissing such petition (141 F. 2d 843). On certiorari, the U.S. Supreme Court affirmed the Court of Appeals' judgment, saying (325 U.S. at pp. 340, 341):

"Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them."

• • • • •

"The Board had exercised its discretion and devised a remedy. It gave long consideration to the problem of adequate relief for the employees discriminated against, and now asserts that it made a mistake . . . What the Board complains of is that it is not permitted to exercise its admittedly wide discretion a second time, or any number of times it may choose.

"Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between litigants and those over whom they have jurisdiction."

In the *City of Tacoma* case, *supra*, the Supreme Court, among other things, passed upon the effect of a Court of Appeals' disposition of an FPC order pursuant to Section 313(b) of the Federal Power Act. That Section is substantially identical with Section 19(b) of the Natural Gas Act, pursuant to which the District of Columbia Court of Appeals disposed of the Commission's Opinion and Order No. 322 in

our case. Following are excerpts from the Supreme Court's opinion (357 U.S. at p. 336):

"It can hardly be doubted that Congress, acting within its Constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had . . . So acting, Congress in § 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders . . . It there provided that any party aggrieved by the Commission's order may have judicial review . . . and that '[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission *shall be final*, subject to review by the Supreme Court of the United States . . . (emphasis added). It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy . . . For Congress, acting within its powers, has declared that the Court of Appeals shall have 'exclusive jurisdiction' to review such order, and that its judgment 'shall be final' subject to review by this Court . . . Such statutory finality need not be labeled res judicata, estoppel, collateral estoppel, waiver or the like either by Congress or the courts."

See, also:

Safeway Stores v. Porter, 154 F. 2d 656, 657 (Emergency C. of A. 1946), cert. den. 328 U.S. 863;

Seatrain Lines v. Pennsylvania R. Co., 207 F. 2d 255, 259 (3rd Cir. 1953);

Bower v. Eastern Airlines, 214 F. 2d 623, 626 (3rd Cir. 1954), cert. den. 348 U.S. 871;

Tomah-Mauston Broadcasting Co. v. Federal Communications Com., 306 F. 2d 811, 913 (D. C. Cir. 1962);

Baltimore & Ohio R. Co. v. New York, N.H. & H.R. Co., 196 F. Supp. 724, 745 (D. C. S.D. N.Y. 1961).

(4446)

The Commission's reliance upon *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) is misplaced. The outcome in that case, coupled with Justice FRANKFURTER's ruminations on the differences

4447

in origin and function of courts and of administrative agencies, creates the impression that agencies may not be bound by a reviewing court's directions. Nevertheless, a close reading of the opinion shows otherwise (309 U.S. at pp. 140, 145):

"The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider the questions which the mandate has laid at rest... That proposition is indisputable..."

"On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction." (Emphasis added)

The Commission also mistakenly relies upon *National Labor Relations Board v. Baltimore Transit Co.*, 140 F. 2d 51 (4th Cir., 1944), cert. den. 321 U.S. 795. That case is cited, at page 5 of Opinion No. 378, for the proposition (at p. 55) that "An administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past." In that case, however, the agency's "mistaken action" had been a failure to take any action whatever. As the Court of Appeals' opinion states (140 F. 2d at p. 54):

"There was no adjudication by the Board of the question of jurisdiction or any other issue, but merely an administrative determination not to take action; and it is perfectly clear that the Board was not precluded thereby from taking

4448

action at a later date, upon a new complaint and a different state of facts, when its jurisdiction had been made clear by intervening decisions of the Supreme Court and it appeared that the act was being violated by the company."

In our case, the situation is totally different. The Commission *did* take action and correctly (not mistakenly) held that it had no jurisdiction over the lease sale transaction. Moreover, the Commission stoutly maintained that same position before the Court of Appeals; and the Court concurred and upheld the Commission's position and affirmatively adjudged that jurisdiction was lacking. There was here no "new complaint," no "different set of facts," no "intervening decisions of the Supreme Court," and no evidence whatever that "the act was being violated," or ever had been violated, by Continental et al.

The authorities we have cited make it crystal clear that the Commission has been precluded, by its own prior determination and the confirmation thereof by the Court of Appeals, from changing its mind and asserting jurisdiction over Continental et al. at this late date. That the Commission lacks such jurisdiction has been finally settled by the Court of Appeals and has become the law of this case. The Commission has been commanded by higher authority to adhere to that adjudication. The Commission may not now elect to disobey the Court's explicit remand.

4449

C. THE COMMISSION IS FORECLOSED BY THE IRS TAX RULING FROM HOLDING THAT CONTINENTAL ET AL. SOLD GAS RATHER THAN LEASEHOLD INTERESTS IN REAL PROPERTY

The IRS ruling of January 13, 1959, held that Continental et al. were selling "leasehold rights" to Texas Eastern. Only because that was so could the transaction be accorded

(4449)

capital gains tax treatment. If Continental et al. were selling natural gas, they would be subject to taxation at the higher rates applicable to ordinary income.

Such ruling by a coordinate arm of the Federal Government is conclusive and binding upon this Commission.

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940);

Westgate-Sun Harbor Co. v. Watkins, 206 F. 2d 458 (D. C. Cir. 1953);

Eastern States Petroleum & Chemical Corp. v. Walker, 177 F. Supp. 328 (D. C., S.D. Texas 1959).

In the *Sunshine* case, *supra*, the Supreme Court held that a finding by the National Bituminous Coal Commission that the company's coal was bituminous constituted res judicata, so that the same question could not be redetermined by the Commissioner of Internal Revenue. Mr. Justice DOUGLAS, writing the Court's opinion, said (310 U.S. at pp. 402-403):

"There is privity between officers of the same government so that a judgement in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government. . . . The crucial point is whether or not in the earlier litigation the representative of the United States (i.e. the Commission) had authority to represent its interests in a final adjudication of the issue in controversy . . . There can be

4450

no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant.

Where a suit binds the United States, it binds its subordinate officials."

The *Westgate* case, *supra*, involved a trademark controversy. The Court said (206 F. 2d at p. 461):

"Also, the finality and binding character of the earlier decision is not impaired merely because the 1931 decision was made following an *inter partes* proceeding (interference action by Van Camp pursuant to Section 6 of the 1905 statute) whereas on the 1948 application the Patent Office denied registration by the *ex parte* method authorized by Section 12(b) of the Lanham Act. The issue in both cases was the same; all the parties required by the statute to be before the Patent Office or the particular court were, in fact, represented in each case, and the method or procedure prescribed for final determination of the right to registration was pursued. The difference in procedure was purely nominal and cannot therefore prevent *res judicata* from being a bar to the second proceeding."

The *Eastern States* case, *supra*, held that a determination of the Oil Import Appeals Board, which had been upheld by the District of Columbia Court of Appeals, was binding upon U.S. Customs officials. The District Judge held (177 F. Supp. at p. 334, footnote 6):

"The fact that the defendants in this suit are different from those in the District of Columbia suit is immaterial, since both sets of defendants are government officials and a judgment against the defendants in the District of Columbia suit would be *res judicata* as to the defendants in this suit. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381."

4451

D. ERRORS OF THE COMMISSION

The Commission erred in its Opinion No. 378 and the accompanying Further Findings by holding and finding, in substance or effect, that the Commission has jurisdic-

(4451)

tion over Continental et al. by virtue of their sale of Rayne Field leasehold rights and interests to Texas Eastern; that such lease sale transaction was not what it purported to be; that such lease sale transaction represented sales of natural gas; and that, by virtue of such lease sale transaction, Continental et al. are producers and sellers of gas from the Rayne Field. The reason why all such holdings and findings are erroneous is that they are contrary to fact, contrary to the Commission's own prior Opinion No. 322, contrary to the position taken by the Commission in its Brief filed with the District of Columbia Court of Appeals, contrary to that Court's opinion, adjudication and remand, and contrary to the IRS ruling of January 13, 1959. Such holdings and findings contravened the rule of res judicata and the law of the case, all as more fully shown hereinabove.

4452

III.

THE COMMISSION'S OPINION NO. 378 WOULD UNLAWFULLY AND UNCONSTITUTIONALLY DEPRIVE CONTINENTAL ET AL. OF PROPERTY WITHOUT REQUISITE NOTICE OR PROCEDURE AND WITHOUT DUE PROCESS OF LAW.

A. RELEVANT FACTS

Sun, Marr and General Crude were unconditionally permitted to withdraw from this proceeding in 1958—almost five years ago (Dockets Nos. G-12913, G-12885 and G-12931). They have since been completely out of this case and have had nothing whatever to do with it.

Shortly after July 27, 1959, when Texas Eastern acquired the Rayne Field leasehold rights from Continental et al., it also acquired, on substantially similar terms, additional leaseholdings from several other owners. None of such other former leaseholders was a party to any of the hear-

(4453)

ings or proceedings herein leading up to the issuance of FPC Opinion No. 378.

Continental filed its Notice of Withdrawal of its abandoned certificate application (Docket No. G-12432) on January 27, 1959. Such withdrawal was unconditionally permitted by the Commission in its Opinion No. 322 of June 23, 1959, and the accompanying Order (mimeo., pp. 11, 12; 21 FPC 868, 869). By letter dated July 10, 1959, the Commission advised Continental as follows:

4453

"Paragraph (B) of the Commission's order of June 23, 1959, Opinion No. 322, *In the Matter of Texas Eastern Transmission Corporation, et al.*, Docket No. G-12446, et al. is the formal granting by the Commission of Continental Oil Company's request to withdraw its application, Docket No. G-12432.

"Insofar as the Commission is concerned, the application is withdrawn and the docket closed. No further steps are necessary."

At that juncture, therefore, Continental was likewise completely out of this case.

The only parties to the review proceeding in the Court of Appeals (D.C. Circuit) were the New York PSC, as Petitioner; the FPC, as Respondent; and Texas Eastern, as Intervenor (287 F. 2d 143). The Court's opinion noted that three of the "producer-sellers" (Sun, Marr and General Crude) had "filed notice of the termination of their gas sales contracts and of withdrawal of their certificate applications"; and, in footnote No. 3 to the opinion: "The fourth producer-seller [Continental] did not file its notice of withdrawal until sometime later" (287 F. 2d 145).

The Court of Appeals reversed the Commission's Order of June 23, 1959 (i.e., the Order accompanying Opinion No. 322) and remanded the case to the Commission with directions that it follow one of two courses: (1) by clarification

(4453)

of Order No. 322, expressly disclaim any approval of the price paid for natural gas by Texas Eastern, or (2) reopen the certification proceeding relating to Texas Eastern's Rayne Field facilities (the 22-mile spur line and

4454

compressor plant) "to permit *Texas Eastern* to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity" (287 F. 2d at p. 146). The remand to the Commission was strictly limited to "further proceedings not inconsistent with the opinion of this court." (Id.)

On July 14, 1961—some seven months after the Court of Appeals rendered its opinion—the Commission issued an "Order Reopening Proceedings, Prescribing Procedures and Fixing Date of Hearing" (26 FPC 167). The members of the Commission who participated in the issuance of that Order were Chairman Kuykendall and Commissioners Stueck, Kline, Swidler and Morgan.*

The Order of July 14, 1961, read, in pertinent part, as follows (emphasis supplied):

"By our Order of June 23, 1959, we issued a certificate . . . authorizing Texas Eastern . . . to construct and operate certain facilities including a compressor station at Rayne Field . . . and some 22 miles of pipeline connecting Rayne Field to Texas Eastern's Beaumont-Kosciusko line. The . . . Court of Appeals . . . in setting aside our aforesaid Order and remanding this matter to us for further proceedings not inconsistent with the opinion of the Court, has suggested the following *permissible* courses: [Then followed a verbatim quotation of the paragraph in the Court's opinion (287 F. 2d at p. 146) which stated that two courses open to the Commission were: (1) clarification of Opinion

* Commissioner Swidler later became Chairman. He is credited with authorship of Opinion No. 378. Mr. Morgan is another member of the Commission who had a hand both in the Order of July 14, 1961, and Opinion No. 378.

No. 322 by disclaiming approval of the price payable by Texas Eastern, or (2) reopening the record in the Texas Eastern certification proceedings to permit Texas Eastern to justify its acquisition costs.]

"In our judgment the first course enunciated by the Court would too long leave unsettled matters of public importance and would provide inadequate protection to the public. Accordingly, we shall reopen the record in this proceeding to afford Texas Eastern an opportunity to make that showing contemplated by the Court's aforequoted latter course.

"It is also necessary and reasonable that we define, but not necessarily limit, the issues and prescribe procedures, as hereinafter ordered, so as to guide the course of this reopened proceeding:

"The Commission orders:

"(A) The consolidated proceeding designated as Docket Nos. G-12446, G-12447 and G12432 is hereby reopened for the purpose of determining:

- "(1) Whether the public convenience and necessity require that the certificate issued in these proceedings by our order of June 23, 1959, and set aside by the Court of Appeals, be reissued in whole or in part;
- "(2) Whether the cost of the Rayne Field gas to Texas Eastern and its customers over the productive life of the field is out of line;
- "(3) Whether Texas Eastern's proposal is in the public interest even if the cost of the gas to Texas Eastern and its customers proves to be out of line; and
- "(4) If Texas Eastern's lease acquisition is not in the public interest by reason of the cost of the Rayne Field gas, whether Texas Eastern should be ordered to cease and desist from operating the 'Rayne Field facilities' or

- as a possible alternative, *whether Texas Eastern will agree that in future determinations of the justness and reasonableness of its rates under Sections 4 and 5 of the Natural Gas Act it will not claim actual costs associated with Rayne Field gas if the reasonable area price is lower than actual cost.*

"(B) In order to better resolve *the aforesaid issues* and that the hearing as hereinafter ordered may proceed in an expeditious manner, it is further ordered that on or before August 30, 1961, *Texas Eastern* file with the Commission and serve on all the parties a supplement to its applications herein to contain at a minimum:

- "(1) *An up-to-date reserve and deliverability study for the Rayne Field to include actual production to date;*
- "(2) *Annual production plans for Rayne Field extending through to the estimated life of the field;*
- "(3) *An exhibit showing the proposed method of accounting by Texas Eastern for the Rayne Field transaction and all costs incident thereto; and*
- "(4) *Study or studies showing the cost of making natural gas from Rayne Field available to the Texas Eastern system, including every cost associated, either incurred and/or anticipated, in the acquisition, further development, production, operation and maintenance of Rayne Field which Texas Eastern claims should be considered in future determinations of the justness and reasonableness of Texas Eastern's rates. Such studies should reflect the anticipated annual changes in the cost of the Rayne Field gas through to the estimated year of abandonment.*

"(C) . . . a hearing will be held on October 23, 1961 respecting the matters stated in paragraph (A) above."

4457

On July 19, 1961, Mr. Burton, one of Continental's attorneys, wrote a letter to the Commission concerning its Order of July 14th. That letter read, in part, as follows:

"... Continental Oil Company, Docket No. G-12432, was included in the order as a designated applicant.

"Paragraph (B) of the Commission's Order of June 23, 1959, Opinion No. 322 . . . granted Continental's request to withdraw its application for a certificate in Docket No. G-12432. Therefore, it would appear that Continental should not be included in the Commission's order of July 14, 1961....

"I trust that appropriate erratum notice may be issued deleting Continental as a party to the reopened proceedings."

The Commission never replied to Mr. Burton's letter, and the erratum notice which he requested was never issued.

Hearings before Presiding Examiner Frazee were held during the fall of 1961 and were closed on December 7 of that year (Examiner Frazee's Decision, p. 7). Neither Continental nor any of the other assignors was represented at, or participated in, these hearings (Id., pp. 1-2, 7). During the hearings, only Texas Eastern offered evidence (Id., p. 7), and no new evidence was adduced which had any material bearing on the question of the Commission's jurisdiction over Continental et al.

After the hearings were closed, the only briefs filed with Examiner Frazee were those of Texas Eastern, the FPC Staff, and five Intervenor (Id. p. 7). The briefs of

4458

the Staff and one Intervenor then raised the jurisdictional issue *for the first time*.

In his Decision of June 29, 1962, Examiner Frazee rejected these belatedly concocted contentions that the Com-

(4458)

mission should exercise jurisdiction over Texas Eastern's acquisition of Rayne Field leases (Id. pp. 7-9). In perfect consonance with the Court of Appeals' opinion and remand, Examiner Frazee said (Id. pp. 9, 10):

"In applying the principles of the *Panhandle* and *Phillips* opinions, *supra*, to the evidence of record in this hearing, it is concluded that the Commission was without jurisdiction over the Rayne Field lease and leasehold acquisition . . . This is not to say, however, that the Commission is without jurisdiction to regulate the purchaser of the natural gas, in this case Texas Eastern . . ."

"Because the Commission did not have jurisdiction over the acquisition of these Rayne Field leases and the natural gas thereunder presents no legal barrier to the Commission's jurisdiction over the purchaser of the gas. This jurisdiction attaches upon the acceptance by Texas Eastern of a certificate of public convenience and necessity issued by the Commission upon the application of Texas Eastern for authorization to connect, by construction and operation of the facilities herein proposed, the Rayne Field gas reserves to its interstate system . . ."

Examiner Frazee then proceeded to consider what price Texas Eastern should be permitted to charge for the gas it extracts from its Rayne Field leases, and concluded that such charge should initially be no more than 18.5¢ per Mcf, exclusive of taxes (Id., pp. 10-20).

4459

Exceptions to Examiner Frazee's Decision were filed by Texas Eastern, the FPC Staff and certain Intervenor (FPC Opinion No. 378 of February 6, 1963, pp. 1, 4). Such exceptions were argued before the Commission on November 29, 1962 (Id., p. 1). Neither Continental nor any of the

other Assignors took any exceptions or participated in the argument before the Commission.

The Commission's Opinion No. 378 of February 6, 1963, to which this Application for Rehearing is addressed, held, as we have previously described, that FPC *did* have jurisdiction over the lease sale transaction and over the Assignors of the leases, as well as over the assignee, Texas Eastern; that such transaction had been effected by a transfer of leasehold rights and interests in form only; that it was actually a "disguised" sale of natural gas for resale in interstate commerce; and that accordingly the Assignors were producers and sellers of natural gas in interstate commerce, and, as such, were subject to FPC jurisdiction and were obligated, pursuant to the Act, to file "rate schedules" and apply to the Commission for certificates authorizing such sales of natural gas.

The Commission further held (Commissioner O'Connor in effect dissenting) that—difficulties have been encountered in determining the exact price at which Continental et al. had sold the Rayne Field gas and the exact cost of that gas to Texas Eastern—the whole lease sale transaction

4460

would have to be rescinded. The Assignors and Texas Eastern were commanded to do so and to agree upon and to enter into new and entirely different contractual arrangements which the FPC can more readily regulate (Opinion No. 378, pp. 10-11).

B. HOW CONTINENTAL ET AL. WERE DENIED DUE PROCESS

In the famous case of *Morgan v. United States*, 304 U.S. 1 (1938), Chief Justice HUGHES spelled out the basic legal and constitutional principles which every administrative agency must observe (304 U.S. at pp. 14-15, 18, 19):

"The vast expansion of this field of administrative regulation in response to the pressure of social needs

is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand a 'fair and open hearing'—essential alike to the legal validity of the administrative regulation and the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'."

"The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party to meet them. The right to submit argument implies that opportunity: otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."

4461

"Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature."

In this case, Continental et al. were denied "a reasonable opportunity to know the claims of the opposing party and to meet them," "the right to present evidence," and a "fair and open hearing." Continental et al. were neither "fairly advised of what the government proposes," nor were they "heard upon its proposals before it issued its final command." In short, they were denied due process

of law, in flagrant violation of the Fifth Amendment to the Constitution of the United States.

We concede Continental was technically and nominally a party to the proceeding which was reopened following remand from the Court of Appeals.* Although

4462

Continental was consistently treated as a party, it was not, and could not be, anything more than a party in limbo, so to speak, because it was seeking nothing from the Commission and the Commission was seeking nothing from it. Continental's 1957 certificate application in Docket No. G-12432 pertained exclusively to a tentative gas sale contract that had been cancelled and abandoned in 1958. That old application was, therefore, as dead as a Dodo in 1961, whether the Commission formally permitted its withdrawal or left the corpse to molder forever in its Docket-coffin.

The only live certificate application pending before the Commission was Texas Eastern's application for authority to operate its Rayne Field facilities—the 22-mile spur pipeline and compressor station. That was entirely Texas Eastern's affair; Continental neither had, nor could have had, any part to play in it.

* Withdrawal of Continental's certificate application (relating to its proposed, but subsequently abandoned, conventional gas sale contract with Texas Eastern) had been officially permitted by the Commission's Order accompanying its Opinion No. 322 of June 23, 1959. That Order, however, was later reversed by the Court of Appeals. Such reversal conceivably restored the situation obtaining before Opinion No. 322 was issued; and therefore, Continental's posture had been that of a party whose notice of withdrawal could not be effective without FPC permission. (FPC Rules of Practice and Procedure, § 1.11(d)(1).) Moreover, Continental was named as a party, and its Docket No. G-12432 was included, in the Commission's Order of July 14, 1961, reopening the proceeding. Mr. Burton's request of July 14, 1961, that such inclusion of Continental be rectified was ignored. Continental and its Docket No. G-12432 appeared in the caption of all subsequent documents filed in the reopened proceeding.

(4462)

As for the other three Assignors—Sun, Marr and General Crude—they were lynched without any process of law whatever. No action was ever taken, nor was an attempt ever made, to bring them into the reopened proceeding. The Rayne Field lease conveyance had been a joint one, effected by a single instrument signed by four Assignors. While Continental's was the largest interest in the transaction—55.9%—the combined interest of the other three Assignors came to 44.1%, or, in money value, approximately \$59.3 million. The most vivid illustration of the Commission's

4463

utter disregard for "the rudimentary requirements of fair play" in this case, is displayed by the fact that the Commission blandly directed Sun, Marr and General Crude, *in absentia*, to surrender their contractual rights to receive so vast a sum of money. See: *Northern Natural Gas Co. v. State Corporation Commission*, — U.S. —, 31 Law Week 4200 at p. 4203 (Feb. 18, 1963).

The Commission's denial of due process to Continental was more subtly accomplished. To appreciate this accomplishment, the following facts must be recalled:

(1) Seven months prior to July 14, 1961, the jurisdictional question had been finally adjudicated by the Court of Appeals. That adjudication had become the law of this case and was conclusive and binding on all parties concerned, including the Commission. There was no possibility that the jurisdictional issue could be lawfully relitigated. This meant that the lease sale transaction was a *fait accompli*; that the Commission was precluded as a matter of law from tampering with the lease sale so far as Continental et al. were concerned.

(2) By its remand, the Court of Appeals had confined further FPC proceedings herein to questions affecting

Texas Eastern alone. The Court had directed the Commission to follow one of two courses: either disclaim approval of the price Texas Eastern had paid for the leases, or give Texas Eastern—and nobody else—an opportunity “to

4464

establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public necessity and convenience.”*

(3) If the Commission elected to pursue the second alternative specified by the Court of Appeals—which the Commission did—the effect on Texas Eastern was plain to see. By purchasing the Rayne Field leases, Texas Eastern had assumed the risk of an ultimate, but highly improbable, determination that it had made an improvident investment. Based on the estimated huge Rayne Field gas reserves, Texas Eastern had clearly, through the lease-purchase transaction, obtained a golden opportunity to produce its own gas much more cheaply than if it paid others for an equivalent volume of gas at then prevailing South Louisiana prices. Nevertheless, it was Texas Eastern, and *not* the Assignors, who would be forced to shoulder a loss in the remote contingency that Texas Eastern’s lease-acquisition costs should finally be held to have been unreasonably and improvidently excessive. Such loss could, moreover, be imposed only upon Texas Eastern, because it was the only one applying for a certificate, and the Commission was unquestionably empowered to impose conditions on the granting of such a certificate.

4465

(4) The Commission’s Order of July 14, 1961, reopening the proceeding, complied meticulously with the opinion and

* The Commission later disobeyed the Court of Appeals by following neither of these prescribed courses; instead, the Commission adopted a completely different and forbidden course of action.

remand of the Court of Appeals. In that Order, the Commission elected to adopt the judicially-prescribed second course of action: "we shall reopen the record in this proceeding to afford *Texas Eastern* an opportunity to make that showing contemplated by the Court's aforequoted latter course." The Commission carefully framed the issues to be resolved; only issues bearing on *Texas Eastern's* application for a certificate covering the Rayne Field facilities were up for determination, to-wit: (1) whether such certificate should be "reissued in whole or in part"; (2) whether "the cost of the Rayne Field gas to *Texas Eastern* and its customers over the life of the field" would be "out of line"; (3) whether "*Texas Eastern's* proposal" would be "in the public interest" even if the cost should prove to be "out of line"; and (4) if "*Texas Eastern's* lease acquisition" should be found to have been unduly costly, "whether *Texas Eastern* should be ordered to cease and desist from operating the 'Rayne Field facilities' or as a possible alternative, whether *Texas Eastern* will agree that . . . it will not claim actual costs associated with Rayne Field gas if the reasonable area price is lower than actual cost." A hearing was ordered "respecting the matters stated in paragraph (4) above," viz: the four specified issues we have just summarized.

4466

(5) To "better resolve the aforesaid issues," the July 14th Order also directed that "*Texas Eastern* file . . . a supplement to its applications herein." Such supplement was to contain "at a minimum" sundry data, all based on the fact that *Texas Eastern* had bought the Rayne Field leases and would hold them "through to the estimated year of abandonment."

(6) The Commission's Order of July 14, 1961, contained not a single mention, or even a hint, that the jurisdictional

issue, or any other issue in any wise involving or adversely affecting Continental et al. would be, or could be, raised or determined in the reopened proceeding.

Section 5(a) of the Administrative Procedure Act, (5 U.S. Code § 1004(a)) provides that persons entitled to notice of an agency hearing shall be timely informed, among other things, of "the nature thereof" and "the matters of fact and law asserted." Similarly, § 1.20(m)(2) of the Commission's Rules of Practice and Procedure imposes this requirement: "The order or notice initiating a hearing . . . shall state the nature of the proceeding." The Commission's Order of July 14, 1961, represented about as explicit a statement of the "nature" of the hearing to be held and of "the matters of fact and law asserted" as any one could desire. According to that Order, only Texas Eastern could be affected by the outcome of the hearing; no issue would be considered or decided which would affect the rights of Continental et al.

4467

Certainly, Continental (or any other Assignor, who, perchance, saw it) was entitled to rely on the Commission's Order of July 14th. With equal certitude, Continental et al. were fully justified in relying on the Commission to honor the judicially established law of the case and to obey faithfully the Court of Appeals' remand.

Based on such reliance, Continental took no part in the hearing before Examiner Frazee, the exceptions to his Decision, or the argument of those exceptions before the Commission. It was clear that if these proceedings were conducted in accordance with the provisions of the Order initiating them and in accordance with the controlling, adjudicated law, no issue was, or could be, raised, considered or determined which would adversely affect Continental or any of the other Assignors. Only Texas Eastern was

called upon to adduce any evidence; only Texas Eastern could, in the end, suffer any possible loss.

It was not until February 7, 1963, that Continental learned from the newspapers that it had been booby-trapped. The incredible morning's news was that in a proceeding wherein Continental was a party in name only, wherein it purportedly had nothing at stake, wherein it had not been represented, wherein it had not been entitled to introduce any evidence, and wherein it had not been heard or had any occasion to be heard, the Commission had ruled against Continental on a vital issue of which Continental had received no notice

4468

and which two years earlier had been finally adjudicated the other way by the Court of Appeals. While Continental, Sun, Marr and General Crude weren't looking and had no reason to be wary, the Commission had contrived to relieve Texas Eastern of the regulatory risks it had assumed and to saddle a back-breaking burden on these unsuspecting absentees.

C. ERRORS OF THE COMMISSION

The Commission erred in stating that the "issues which arise from the record in this proceeding" included the issue "whether we have jurisdiction over the lease sale arrangement" (Opinion No. 378, p. 4). So far as the jurisdictional question was concerned, the record before the Commission in 1962-1963 was to all intents and purposes identical with the record which was before the Commission when it wrote its Opinion No. 322 in 1959. On that earlier occasion, the same record made it clear to the Commission that it had no jurisdiction. In the interim, moreover, such want of jurisdiction had been judicially confirmed and settled. Thus, the jurisdictional issue did not really "emerge from the

record in this proceeding"; it emerged from a change of heart and a change in FPC membership.

The Commission erred in disagreeing with Texas Eastern and Examiner Frazee on the jurisdictional issue (Opinion No. 378, p. 4). As we have shown above, Texas Eastern and the Examiner were 100% right in contending that the Commission lacked jurisdiction over the transaction

4469

between Continental et al. and Texas Eastern "because what was to have been a sale of gas has been converted into a sale of leases," and that the Commission was "left . . . only with the jurisdiction to disallow a portion of Texas Eastern's cost of its gas supply."

The Commission erred in misconstruing and repudiating its Order of July 14, 1961, which reopened the proceeding following remand from the Court of Appeals (Opinion No. 378, pp. 5-6). Opinion No. 378 first picks out the four words "but not necessarily limit" from one of the Order's preambles, and declares, in effect, that those four words nullified the hundreds of other words covering most of two pages of fine type in the official print (26 FPC 167-168). We have already quoted (*ante*, pp. 60-62) the relevant parts of the July 14, 1961, Order so that its full flavor can be tasted. The preamble in question recited:

"It is also necessary and reasonable that we define, *but not necessarily limit*, the issues . . . so as to guide the course of this reopened proceeding."

Then followed paragraph (A) of the Order itself, which directed that: "The consolidated proceeding . . . is hereby reopened for the purpose of determining" the four specific issues we have previously discussed (*ante*, p. 71). If those were not the issues to be determined in the reopened proceeding, then the Order of July 14, 1961, was a sham, a

(4469)

delusion, and a snare in direct violation of the controlling procedural statute (5 U.S. Code, § 1004(a)). It might as

4470

well be said that the four words "but not necessarily limit," gave notice that (Continental et al. were to be tried for arson, rape, murder or treason, as to say the Order of July 14th constituted notice that the judicially settled jurisdictional question was to be relitigated.

Indeed, the jurisdictional issue was not tried anew in the record of the reopened proceeding. That issue was raised initially—and then only in briefs—after the record pertaining exclusively to other matters had been concluded and closed.

Near the top of page 6 of Opinion No. 378, it is stated that "in any event the jurisdictional issue is comprehended in the issue whether the public convenience and necessity require that the certificate [to Texas Eastern] be reissued." That just isn't so. Notice of intention to inquire into the public convenience and necessity regarding Texas Eastern's facility certificate could not possibly "comprehend" the totally different and distinct question of whether the Commission possessed jurisdiction over the transfer of leases and over the Assignors who made the transfer. The error here was not so common as confusing oranges and apples; it was more in the order of confusing a peanut with an elephant.

Also near the top of page 6, Opinion No. 378 says: "The issue of jurisdiction is fundamental and could not be waived" (footnoted to "compare" *United States v. Corrick*, 298 U.S. 437, 440, and *Mitchell v. Maurer*, 293 U.S. 237,

4471

244). Those cases are way off the point; they merely repeat the familiar doctrine that if a lower court *exercises jurisdiction which it lacks*, such basic error may later be corrected

at any time on appeal, even though no objection was voiced in the court below. Here, we have the opposite situation. The fact that the Commission lacked jurisdiction over the lease sale transaction had been finally adjudicated by the Court of Appeals on the authority of the Supreme Court's decision in the *Panhandle* case; yet the Commission sought, nevertheless, to assert jurisdiction in contravention of the appellate court's pronouncement of the law of this case. The Commission is powerless to "waive" either the Court of Appeals' adjudication or the *Panhandle* decision of the Supreme Court.

Opinion No. 378 errs again in the first paragraph on page 6 by taking comfort from the fact that: "The jurisdiction issue was raised and briefed before the examiner, and was briefed and argued before the Commission." No such issue was raised, briefed or argued, either by or against Continental et al. They were not there, and they had no standing to participate in those wrangles. Continental et al. were, as we have previously pointed out, fully warranted in relying on (1) the Commission's own enumeration, in its Order of July 14, 1961, of the only issues which could properly be considered and decided; and (2) the final adjudication by the Court of Appeals, which had been sought by the Commission itself.

4472

We understand that in the reopened proceeding the person who advocated most vociferously that the Commission should assert jurisdiction over the lease sale transaction was an FPC Staff Counsel who was a newcomer to this long-drawn-out proceeding. He it was, in his capacity as the Commission's own lawyer, who succeeded in convincing his bosses that they might properly reverse their Examiner, themselves, the Court of Appeals and the U. S. Supreme Court, and that they might also safely ignore the laws of Louisiana, the prior ruling of the IRS, and the

Constitutional safeguards found in the Fifth Amendment. In short, the Commission argued with itself and decided to change its mind, do an abrupt about face, and declare everybody else out of step. Continental had no reason to anticipate any such sudden and drastic contradiction of everything that had happened before.

4473

IV.

THE COMMISSION'S DISPOSITION OF THESE PROCEEDINGS IS
UNAUTHORIZED BY LAW, IMPOSSIBLE TO COMPLY WITH,
AND A LEGAL NULLITY

A. RELEVANT FACTS

The lease sale transaction between Continental et al. and Texas Eastern was consummated on July 27, 1959. Total payments made to date by Texas Eastern on account of the purchase price come to approximately \$37 million. The remaining \$97.4 million owed by Texas Eastern is evidenced by its outstanding promissory notes, which continue to be liquidated by monthly installments. If Texas Eastern should default in payments on the notes, Continental et al. may foreclose their mortgages and recover the Rayne Field leases.

Included with the sale of leasehold interests was a sale of many hundreds of thousands of dollars worth of equipment and facilities used or useful in connection with the Rayne Field producing operations. Since July 1959 this personal property has been subject to wear and tear, and has depreciated in value. Some of it has worn out.

Reference is made to the IRS ruling of January 13, 1959, more fully described and quoted from *ante*, pp. 47-48.

Texas Eastern started pulling gas out of the Rayne Field in August 1959, and in the intervening three and a half years has extracted something over 165 billion cubic

feet of gas. Deliveries of gas from the field are continuing at a rate of around 140 million cubic feet per day.

4474

Set forth below are pertinent excerpts from the Commission's Opinion No. 378 and the accompanying Further Findings and Order, issued February 6, 1963:

(1) *The Commission considered the lease sale arrangement objectionable because it would be difficult to regulate:*

"Control limited to approving the costs of the gas to the purchasing pipeline is, of course, not an effective way to regulate producer prices because in the large a pipeline must be allowed to pass on its purchased gas costs to the ultimate consumer or it cannot continue to discharge its public service responsibilities" (p. 9).

"... the terms of the instant arrangements ... certainly did not envision adjustments from time to time to comply with FPC rate regulation. ..." (Id.)

"Another consideration ... is the fact that the Commission is now implementing the area approach to producer regulation. Sales under the arrangements herein contemplated could not be readily adjusted. ..." (Id.)

"The record in this proceeding clearly demonstrates the difficulty of attempting to determine a proper price for this gas under the present arrangement. ... Thus, in order to determine the cost, lengthy hearings would be required and careful consideration would have to be given to factors that should not be involved in a certificate proceeding. Even then the per Mcf price of the gas could not be determined with any reasonable degree of accuracy at this time because many of these

(4474)

factors are based on estimates and forecasts of varying degrees of reliability" (pp. 9-10).

"What is objectionable here is the attempt to disguise a transaction . . . with provisions that would make it difficult if not impossible to subject to regulatory control the price for the sale to an interstate pipeline of this large body of gas" (p. 10).

4475

(2) *Because of such regulatory difficulties, the Commission found the lease sale transaction to be not in the public interest:*

"... it is not in the public interest for this Commission to certificate a transaction such as the one presented to us on this record" (p. 9).

"We now find . . . that the transaction is not in the public interest as a way to acquire gas supplies" (p. 10):

(3) *The Commission therefore commanded the parties to rescind the lease sale transaction and to agree upon and enter into new and different contractual arrangements:*

"In view of the deficiencies of the lease sale arrangement we are of the opinion that . . . we should require the formulation of a different means for Texas Eastern's acquiring gas supplies" (p. 10).

"In these circumstances the parties should be given ample opportunity to work out new arrangements. . . . We shall therefore afford Texas Eastern and its suppliers a period of 6 months to complete such arrangements. . . ." (Id.)

"In making the requirement for filing a new arrangement we are not defining our requirements with precision, for we think that in view of the procedural delays

and the contractual arrangements that have been made the parties should have considerable freedom to extricate themselves from this complicated situation. However, consistent with our discussion above the lease sale arrangement should be rescinded. . . . The new contract, of course, would be effective from the delivery of the first gas from the Rayne Field and would be a substitute for the lease sale arrangement now proposed. We do not think it would be inequitable to require this revision. . . ." (p. 11).

"The Commission orders:

4476

"(B) . . . Texas Eastern shall file a revised application for a certificate to put into effect a new arrangement for the supply of gas to Texas Eastern from the Rayne Field. . . ." (p. 12).

(4) *Continental et al were directed to file rate schedules and applications for certificates authorizing their sales of gas to Texas Eastern under the "new arrangements":*

"It will now be necessary for the producers to file an application for a certificate . . . to obtain Commission approval of the sale of this gas" (p. 9).

"We shall therefore afford Texas Eastern and its suppliers a period of 6 months to . . . make the necessary filings with this Commission" (p. 10).

". . . the producers, or one producer acting for all, should file rate schedules for the sale of gas to Texas Eastern and corresponding applications for certificates. . . ." (p. 11).

"The Commission further finds:

"(1) Continental, Sun, Marr and General Crude are independent producers of natural gas and natural gas companies . . . by participation in the Lease Sale Agreement discussed herein.

"(3) Continental, Sun, Marr and General Crude have not obtained certificates or filed rate schedules in connection with their sales of natural gas. . . ." (Id.)

"The Commission orders:

"(B) Continental, Sun, Marr and General Crude within six months of the issuance of this order shall make filings of appropriate rate schedules and applications for certificates . . ." (p. 12).

4477

B. ARGUMENT

Opinion No. 378 commands the parties to do two things that can't be done: rescind the 1959 lease sale transaction and make some sort of "new arrangements" which the Commission will be able to regulate more easily. Each of these steps requires that Continental et al. on the one hand and Texas Eastern on the other arrive at an agreement: first, on the terms of the rescission, and secondly on the terms of the "new arrangements." The Commission possesses no authority whatever to force any person against his will to make an agreement. The Natural Gas Act is the only source of the Commission's authority, and we have been unable to find anything in the Act which endows the Commission with any such imperial powers.

Neither have we been able, through diligent search, to find any case directly in point. The apparent absence of

any such precedent suggests that this is the first time any agency or court has felt it could, by decree, force a meeting of the minds. The meager fruit of our research effort consists of passages from two District Court decisions:

In *Shipley v. Pittsburgh & L.E.R. Co.*, 83 F. Supp. 722 (W.D. Penn. 1949) the Court said (83 F. Supp. at p. 758):

"...no more can an administrative agency such as the National Railroad Adjustment Board rewrite a contract by administrative fiat than a court can by judicial construction."

4478

And in *Irvin v. Brown Paper Mills Co.*, 52 F. Supp. 43 (E.D. Ark., 1943), reversed on other grounds 146 F. 2d 232 (8th Cir. 1944), the District Judge observed (52 F. Supp. at p. 45):

"It is axiomatic that the court cannot make a contract for the parties but can only construe and enforce the contract which they have made; and if there was no meeting of the minds, there is and can be no contract."

It is, of course, a hornbook principle of contract law than an agreement to make an agreement is no agreement at all. *A fortiori*, if a private agreement to agree is a legal nullity, so also must be a governmental or judicial command that parties agree on something.

Rescission of the lease sale transaction is now a physical and financial impossibility. When that transaction was entered into almost four years ago, the Commission acted, so to speak, as head chef. The resulting omelet has not only been beaten and cooked, but has to a large extent been consumed. At this late date, the egg cannot be regurgitated, unscrambled and put neatly back into its shell.

There is today no way to restore the parties to the 1959 lease sale transaction to their *status quo ante*. Texas Eastern cannot put some 165 billion cubic feet of gas back

(4478)

into the ground. The Rayne Field operating facilities and equipment cannot be made like new. And the income tax hurdle is absolutely insurmountable.

4479

At page 11 of Opinion No. 378, it is stated that: "We [the Commission] do not think it would be inequitable to require this revision." Even if the Commission were a court of equity, it could hardly cherish any such thought and it certainly would abstain from rendering any such highly inequitable decree as has been issued in this case.

The Commission's expressions of solicitude for the plight of the parties (Opinion No. 378, p. 11) are touching, but provide no comfort at all. The parties have, indeed, encountered "procedural delays" in this case and they have, indeed, made past "contractual arrangements." Those arrangements (the 1959 lease sale transaction) were entered into with the Commission's assistance and blessing. This "complicated situation" from which the parties are now offered "considerable freedom to extricate themselves" did not arise out of the lease sale transaction; it resulted from the Commission's turn-about-face, its belated assertion of jurisdiction where jurisdiction it has none, and its edict that the parties rescind their 1959 transaction and enter into a completely new one. The only feasible method of "extricating" all concerned from "this complicated situation" is the method we are urging: that this Application for Rehearing be granted; that Opinion No. 378 be withdrawn and vacated; and that the Commission once again disclaim jurisdiction.

4480

C. ERRORS OF THE COMMISSION

For the reasons heretofore expressed, we submit that each and all of the statements, findings and orders quoted

above from Opinion No. 278 (*ante*, pp. 80-82) constituted error.

Regulatory difficulties and inconveniences provide no ground for asserting non-existent jurisdiction nor for commanding that the parties' existing contractual relationship be rescinded and replaced by "new arrangements." Other fallacies and inconsistencies in this aspect of the majority opinion are sufficiently pointed out in Commissioner O'Connor's concurring opinion.

The very fact that the Commission now finds that the provisions of the Rayne Field lease sale transaction "make it difficult if not impossible to subject to regulatory control the price for the sale to an interstate pipeline of this large body of gas," clearly illuminates one of the reasons why Congress has steadfastly refused to empower the Commission to exercise jurisdiction over such transactions: they are not readily susceptible to administrative regulation.

4481

CONCLUSION

For each and all of the foregoing reasons, Continental hereby requests that the Commission:

(1) Grant rehearing of its Opinion No. 378 and the accompanying Further Findings and Order issued on February 6, 1963;

(2) Withdraw and vacate said Opinion No. 378 and said accompanying Further Findings and Order;

(3) Again disclaim jurisdiction (a) over the transaction of July 27, 1959, by which Continental et al. conveyed and assigned leasehold rights and interests in the Rayne Field to Texas Eastern; (b) over any and all transactions connected with such conveyance and assignment; and (c) over the Assignors by reason of their participation in any and all of the aforementioned transactions;

(4481)

(4) Again permit Continental unconditionally to withdraw its certificate application in Docket No. G-12432;

(5) Permit the unconditional withdrawal of Continental as a party to this consolidated proceeding which was reopened by the Commission's Order issued on July 14, 1961 (26 FPC 167);

(6) Take no further action and conduct no further proceedings in this consolidated proceeding, or in any other proceeding or litigation, which is inconsistent

4482

with the opinion of, and remand from, the United States Court of Appeals for the District of Columbia in *Public Service Commission of the State of New York v. Federal Power Commission*, decided on December 8, 1960, and reported in 287 F. 2d 143.

Respectfully submitted,

LLOYD F. THANHOUSER

BRUCE R. MERRILL

THOMAS H. BURTON

JOHN M. BERLINGER

Attorneys for

Continental Oil Company

By LLOYD F. THANHOUSER

(Lloyd F. Thanhouseer)

Dated at Houston, Texas,
this 4th day of March, 1963

4483

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Lloyd F. Thanhouseer, who, being by me duly sworn, on oath deposes and says: That he is Vice

(4489)

President and General Counsel of Continental Oil Company; that he has prepared and read the foregoing Application of Continental Oil Company for Rehearing, and that the facts stated therein are true to the best of his knowledge, information, and belief.

LLOYD F. THANHOUSER
Lloyd F. Thanouser

Sworn to and subscribed before me, this 6th day of March, 1963.

HALLIE P. MADELEY
Hallie P. Madeley
Notary Public in and for
Harris County, Texas

(SEAL)

4484-4488

CERTIFICATE OF SERVICE

4489

Docketed Mar. 7, 1963

BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-12446, G-12447, G-12432

In the Matters of

TEXAS EASTERN TRANSMISSION CORPORATION
CONTINENTAL OIL COMPANY

Application for Rehearing and Stay of M. H. Marr

Comes now M. H. Marr (Marr), a party to the transaction which is the subject of these proceedings and a person aggrieved by the Commission's Opinion No. 378 and accompanying order issued herein on February 6, 1963,

(4489)

and, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Rules of Practice and Procedure, hereby applies for rehearing and a stay of such opinion and order. In support hereof Marr shows as follows:

I.

On July 15, 1957, Marr filed an application in Docket No. G-12885 for a disclaimer of jurisdiction, or, in the alternative, for a certificate of public convenience and necessity under Section 7(c) of the Act to authorize the sale of natural gas from the Rayne Field, Acadia Parish, Louisiana, to Texas Eastern Transmission Corporation (Texas Eastern) for resale. The contract under which such sale was to be made was

4490

cancelled and the application was withdrawn. Such withdrawal of the application was permitted to become effective August 16, 1958 and the record closed as of such date pursuant to the Acting Secretary's letter of August 12, 1958, written at the direction of the Commission.

The Commission's Opinion No. 378 and accompanying order purport to affect Marr's rights and interests and to make Marr a party to these proceedings in order to accomplish its objective, namely, to abrogate a consummated agreement. Consequently, Marr is aggrieved by such action and has a direct and vital interest in such action and, as a consequence, has standing within the contemplation of Section 19(a) of the Act and the Rules of Practice and Procedure to maintain this application.

II.

It must be recognized at the outset that the lease sale arrangement which the Commission seeks to abrogate is a consummated transaction. In accordance with the terms of such arrangement millions of dollars have changed hands,

(4492)

Texas Eastern has acquired leases covering roughly a trillion cubic feet of natural gas reserves, and as a result the conduct of the parties in other business matters has been substantially influenced by the consequences of the execution of the lease sale arrangement.

4491

For example, the Internal Revenue Service has granted to Marr a formal ruling to the effect that the lease transfer and sale in the form provided in the lease sale agreement were of leasehold rights subject to capital gains tax rate rather than ordinary rates. This tax ruling was the determining factor in Marr's decision to sell his leasehold interests and had it not been granted, Marr would not have entered into the lease sale agreement. It is submitted that such ruling of the Internal Revenue Service cannot be negated by a collateral action of this Commission. These are real, practical considerations which the Commission has ignored. The simple fact is, aside from the Commission's lack of jurisdiction, that as a practical matter all of the results which have flowed from the execution of the lease sale agreement cannot be unscrambled on a *nunc pro tunc* basis and the clock turned back to 1958.

Nevertheless, the Commission having determined that it has jurisdiction over the lease sale arrangement concludes that because of the "deficiencies" in such arrangement it must be "rescinded" and a new contract entered into effective from the date of first deliveries from the Rayne Field (pp. 10-11). Such new substitute contract is required to be recast in a form which will enable the Commission "to fix just and reasonable" rates and which will be adaptable to any area rate determination (p. 9).

4492

By its Opinion No. 378 and accompanying order the Commission purports to set the controlling standards for a new

contract required to rescind the lease sale arrangement and to be in substitution therefor. Such a requirement, if effectuated, would operate to alter and affect adversely the contractual rights of Marr and the other sellers¹ under the lease sale arrangement and, in addition, would have serious adverse effects upon other business relations which have been entered into by Marr as a consequence of having executed such arrangement and which relations are not remotely subject to this Commission's jurisdiction (See: *Columbia Broadcasting System v. United States*, 316 U.S. 407, 422 (1942)). Marr has specifically planned and arranged his past and future general financial affairs based on the lease sale arrangement of July 27, 1959, and the monies payable to him pursuant to the terms thereof. Such requirement of the Commission would result in a deprivation of Marr's rights and property and would cause him substantial and irreparable injury.

III.

For purposes of this application for rehearing and stay Marr assumes that Opinion No. 378 and the accompanying

4493

order make him a party to this proceeding and therefore such opinion and order are erroneous, unlawful and of no force and effect as to Marr because Marr was afforded no notice or opportunity for hearing with respect to the issues determined herein and for the further reasons that the Commission has no jurisdiction: (1) over the lease sale transaction, (2) to require the rescission of the lease sale arrangement, (3) to require that a substitute agreement be entered into to displace the lease sale arrangement, (4) to require that a new substitute contract for the lease sale

¹ Continental Oil Company, Sun Oil Company and General Crude Oil Company, together with other "minority leaseholders" (p. 2).

arrangement be made effective retroactively to the date of first deliveries of gas from the Rayne Field, (5) to require as provided by ordering Paragraph (B) that Marr "make filings of appropriate rate schedules and applications for certificates of public convenience and necessity" (p. 12) and (6) to require as further provided by Paragraph (B) that Texas Eastern "file a revised application for a certificate to put into effect a new arrangement for the supply of gas to Texas Eastern from the Rayne Field in conformity with this opinion, the public interest and the Natural Gas Act." The Commission further erred in that its findings are not supported by substantial evidence and are contrary to the evidence.

IV.

Although the Commission treats Marr as a party to this proceeding, Marr has had no notice or opportunity for a

4494

hearing on the issues determined by Opinion No. 378 and the accompanying order in violation of the requirements of the Natural Gas Act, the Administrative Procedure Act and the decisions of the Supreme Court of the United States.

The Commission in adopting such opinion and order has purported to act under Sections 4 and 7 of the Natural Gas Act, but it is clear that both of such sections of the Act contemplate that notice and hearing be first afforded before action adverse to any person is taken with respect thereto. It is equally clear that before a jurisdictional determination is made under Section 1(b) of the Act, notice and opportunity for hearing must first be provided.

Similarly, under the Administrative Procedure Act, Section 5 requires that in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, timely notice must be provided with

(4494)

respect to, *inter alia*, "the matters of fact and law asserted" and an opportunity must be afforded for hearing (See also Section 7(c)).

The Supreme Court has recognized these rudimentary prerequisites of due process on numerous occasions but it is necessary here to mention only a couple of the landmark cases. In *Morgan v. United States*, 304 U.S. 1, the Court stated as follows (pp. 18-19):

4495

"* * * Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised what the Government proposes and to be heard upon its proposals before it issues its final command."

In *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, the Supreme Court held that contract rights of a party cannot be invalidated without an opportunity to be heard, stating as follows (p. 233):

"The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, * * *. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. * * * The rule, which was applied in the cases cited to suits in equity is not of a technical character, but rests upon the plainest principle of justice, equally applicable here."

See also: *Northeastern Gas Transmission Co. v. Federal Power Commission*, 195 F. 2d 873; *cert. denied*, 344 U.S. 818.

It is clear from the foregoing that the Commission's Opinion No. 378 and the accompanying order are invalid

as to Marr since Marr has been denied the due process of law to which he is entitled.

V.

In its Opinion No. 322 in these proceedings, issued June 23, 1959, approving the construction and operation of

4496

facilities by Texas Eastern to take the Rayne Field gas the Commission found (21 F.P.C. 860, at page 864):

“ * * * Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate” (Italics supplied).

Thus, contrary to the statement in the Commission's current Opinion No. 378 (page 5) there was “discussion” by the Commission of the jurisdictional issue in its Opinion No. 322, and it held that it lacked jurisdiction.

Moreover, on appeal, the Court of Appeals for the District of Columbia Circuit, in *Public Service Commission v. Federal Power Commission*, 287 F. 2d 143, specifically discussed the jurisdictional issue in its decision, at several points, as follows (page 145):

“The significance of this change in the form of the transaction, at least from the standpoint of the producer-sellers; is manifest. Sales of natural gas by an independent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petroleum Co. v. State of Wisconsin*, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035. But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 69 S. Ct. 1251, 93 L. Ed. 1499. * * *

(4496)

Further, the Court stated (page 146):

“It is of no importance here that the transactions by which Texas Eastern proposes to acquire the gas will themselves be, by virtue of a change in form, *beyond the regulatory control of the Commission*” (Italics supplied).

4497

Despite this clear and unequivocal discussion and holding by the Court of Appeals in this case, the Commission now, in its Opinion No. 378, seeks to minimize the effect of and to discard the Court's finding that it lacks jurisdiction. The Commission erroneously states that the Court “without discussion” held that the Commission lacked jurisdiction. Furthermore, the Commission erroneously states that the jurisdictional question was “hardly considered” and was given but “passing mention” by the Commission and the Court (Opinion No. 378, page 5). The Commission thus attempts to repudiate the finding of the Court of Appeals in this very case by erroneously accusing the Court of not seriously considering the jurisdictional issue. If any further proof were needed that the question of jurisdiction over the transaction was considered in the case, a reference to the Commission's brief in the Court reveals that it repeatedly emphasized the Commission's lack of jurisdiction and cited authorities to support its position.

VI.

The Commission erroneously concludes in Opinion No. 378 (page 7) that the instant proceeding is “distinguishable” from that involved in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. That case is directly

4498

in point and constitutes a precedent which precludes the assertion of jurisdiction by the Commission over the transfer of leases here involved.

The Commission's first ground of purported distinction is the assertion that in the *Panhandle* case "the leases were undeveloped so that the transfer did not resemble a sale of gas as did the sale of developed leaseholds here" (page 7). The opinion of the Supreme Court in the *Panhandle* case clearly discloses that it was not based upon the narrow ground advanced by the Commission. Repeatedly throughout its opinion the Supreme Court referred to "gas leases" as such, and without distinction as to development or non-development, as an "essential part of production" and therefore beyond the Commission's jurisdiction because of the "production and gathering" exemption in Section 1(b) of the Natural Gas Act (337 U.S. at pages 505, 508, 513, 515). Moreover, it is equally clear from the Supreme Court's opinion that it was aware of the fact that exploration and development had taken place sufficiently to enable reserve estimates to be made. Thus, the majority opinion of the Court recites that *Panhandle* "had included the acreage here involved as part of its gas reserves." Justice Black, in his dissenting opinion, stated that (337 U.S. at page 519) :

4499

"* * * According to allegations in the Commission's complaint the respondent gas company has already received from its customers large sums of money from rates which reflected expenses incurred in maintaining these reserves and for exploration and development costs in relation to them."

An examination of the complaint which the Commission filed in the United States District Court demonstrates the

(4499)

extent to which exploration and development activities had actually taken place on the gas acreage involved in the *Panhandle* case. Thus, the Commission alleged in its complaint in the United States District Court (Paragraph XVII) that:

“The delay rentals, renewal bonus payments and other exploration and development costs relating to the aforesaid natural-gas leases included by the Commission in *Panhandle*’s operating revenue deductions in the rate proceedings referred to in Paragraph (c) of the Commission’s order of November 10, 1948, Exhibit ‘B’ hereto, amount to date to a sum in excess of \$665,000.”

The gas leases involved in the *Panhandle* case had been explored and developed sufficiently to result in an accepted gas reserve estimate of 700 billion cubic feet (337 U.S. at page 500). It stands to reason that an estimate of such a substantial reserve, comparable in magnitude to that in the Rayne Field, could not have been made or accepted without adequate exploration and development. Moreover, nowhere in any of the decisions in that case was there any refutation of the fact that substantial “exploration and development costs” had been incurred prior to the transfer

4500

of the leases. The facts of the *Panhandle* case are precisely parallel with the instant one in this respect because the Commission has itself recognized and stated, in its Opinion No. 378, that the gas leases here involved “had been developed to an extent where reasonable estimates could be made as to the available reserves,” (Opinion No. 378, page 6).

The second purported ground of distinction of the *Panhandle* case is the assertion by the Commission in Opinion No. 378 that “the reserves here are connected or

are to be connected to an interstate pipeline and are to be sold in interstate commerce while those in *Panhandle* were transferred to a corporation which subsequently sold them in intrastate commerce" (pages 7-8). Here again, the Commission obviously has groped for a purported distinction which has no substance whatever. The Supreme Court in the *Panhandle* case did not predicate its decision upon the circumstance that the gas which might be produced from the leases involved in that case was to be sold intrastate. Rather, the Court repeatedly emphasized that the Commission was prohibited by the provisions of the Natural Gas Act from interfering in the forbidden area of transfer of gas leases because gas leases and gas reserves are production facilities over which the Commission has no jurisdiction and because the transfer of gas leases and gas reserves is a production activity over which the

4501

Commission has no jurisdiction. Among other things, the Supreme Court said (337 U.S. at pages 513-514):

"The District Court found as a fact, and the finding is undisputed by the Commission, that, 'it has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases.' Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include production. If possible all sections of the Act must be reconciled so as

to produce a symmetrical whole. We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power" (Footnotes omitted).

With the exception of this *Panhandle* case where the Commission was overruled, ever since the enactment of the Natural Gas Act in 1938 and ever since the decision of the Supreme Court in *Phillips* the Commission has never heretofore attempted to exercise jurisdiction over gas leases or the transfer of gas leases.

The third purported distinction of the *Panhandle* case relied upon by the Commission is the erroneous statement that "in the *Panhandle* case the gas reserves passed entirely out of the control of the seller while here the seller retained rights to oil, gas if found other than in particular

4502

strata, production payments for liquids, and management of the field" (Opinion No. 378, page 8). In the first place, Marr retained no rights whatsoever in the gas leasehold estates which he sold except only his mortgage lien to secure unpaid portions of the consideration. Marr retained no management rights over any of the gas leasehold estates which he sold. In the second place, the Commission completely disregards the fact that the Supreme Court in the *Panhandle* case dealt with gas leases as production facilities and the transfer of gas leases as an activity of production. In addition, the Commission is factually incorrect when it asserts that in the *Panhandle* case the "gas reserves passed entirely out of the control of the seller." The Supreme Court's decision in that case recites that *Panhandle* retained "the option to purchase on or after January 1, 1965, all or part of the gas produced

from this land" (337 U.S. at page 500). Thus, the *Panhandle* case involved a reservation of the right to purchase all or part of the gas produced representing a considerably more far-reaching retention of rights than the normal security for payment of consideration retained by Marr.

The Commission next purports to rely upon the Supreme Court's decision in the *Phillips* case (347 U.S. 672), apparently for the premise that the *Phillips* case was intended

4503

to overrule the prior *Panhandle* case. In reaching this conclusion, the Commission disregards the fact that the Supreme Court, when it decided the *Phillips* case, was well aware of its prior decision in the *Panhandle* case. Rather than overruling the latter case in any respect, it was cited and relied upon by the Supreme Court when it decided *Phillips* (347 U.S. at page 678). Moreover, the Court of Appeals for the District of Columbia Circuit, when it decided the instant case, cited both the *Phillips* and *Panhandle* cases and distinguished them when it held the Commission to be without jurisdiction over gas leases. The Court said (287 F. 2d 143 at page 145):

" * * * Sales of natural gas by an indepent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. *Phillips Petroleum Co. v. State of Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035. But the Commission has been held to lack jurisdiction over gas leases. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed 1499. * * * "

In this respect also the Commission has defied the decision of the Court of Appeals for the District of Colum-

(4503)

bia Circuit in this very case. We have noted the fact that the Commission has heretofore announced, in *Cities Service Gas Co.*, 26 F.P.C. 665, 666, that "we are not bound by the decision of one circuit." We are further amazed by the Commission's statement in *Lo-Vaca Gathering Co.*, 26 F.P.C. 606, 615,

4504

that, to the extent to which a court decision "may be inconsistent with the action we take here, we believe it was erroneously decided." However, this is the first instance we know of where the Commission has dared to defy the ruling of a Court of Appeals in the same case under consideration. The consequences and implications of this course of action, if permitted, would effectively destroy the rights of parties to court review and render the decisions of the courts meaningless.

The citation by the Commission of the cases of *Saturn Oil & Gas Co. v. Federal Power Commission*, 250 F. 2d 61 and *Continental Oil Company v. Federal Power Commission*, 266 F. 2d 208, is equally without merit. In the *Saturn* case, the Court specifically gave effect to the doctrine of the *Panhandle* case when it stated (250 F. 2d at page 68):

"In *Interstate Natural Gas Co. v. Federal Power Commission* and *Federal Power Commission v. Panhandle Eastern Pipe Line Co.* the court recognized that effect must be given the production or gathering exemption. These cases and *Colorado Interstate Gas Co. v. Federal Power Commission* are referred to in the Phillips decision as holding that the production or gathering exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas and not to the business of production and gathering. Until there is a sale of the

natural gas produced by such operations and installations in interstate commerce for resale, they are exempt. In the event of such a sale the jurisdiction of the Commission applies but only because of the sale and only to the extent that the Natural Gas Act confers jurisdiction."

4505

In the *Continental* case the Court also gave effect to the *Panhandle* case stating that (266 F. 2d at page 210) "Although not specifically so providing, the language of this exemption [Section 1(b) exemption of production or gathering] has, as to other types of facilities, been held to cover facilities of production or gathering. See *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 504-505." The basis for the Court's decision was that "this record discloses that these are facilities for the sale of the gas that are not facilities of production" (266 F. 2d at page 211).

It is apparent that these cases confirmed the holding of the Supreme Court in the *Panhandle* case and in no manner constitute precedents for overruling that decision as the Commission has here attempted. Furthermore, the *Saturn* and *Continental* cases as authority for the Commission's position here are not applicable because there are no facilities retained or owned by Marr which could be or are used for the production of gas. Therefore, the Commission's attempted reliance upon these cases is refuted by the Commission's own statement in Opinion No. 378 (page 8) that in those cases "'production' was complete before the point of sale." This language supports our own position, based upon the factual situation here, where the leases and all facilities were sold by Marr before production for sale or transportation in interstate commerce occurred.

VII.

The extent to which the Commission flagrantly and avowedly seeks, by its Opinion No. 378, to extend its jurisdiction beyond that conferred upon it by Congress in the Natural Gas Act is well illustrated by the conclusionary language on pages 8-9 of Opinion No. 378, where the Commission states:

"Thus we conclude that a sale of gas in interstate commerce during the course of production and gathering is subject to our jurisdiction. Likewise, the sale of gas (or reserves) made under the circumstances here involved by the producers to Texas Eastern for transportation in its pipeline is a sale of gas for resale in interstate commerce and is subject to our jurisdiction."

The omission from the first sentence and the first clause of the second sentence of the foregoing quotation of the words "for resale" when referring to the "sale of gas" or the "sale of gas (or reserves)" is especially significant. The Commission's reasoning seems to be that *any* sale of gas *should* be subject to its jurisdiction. Thus, it would disregard the requirement that a sale must be for resale to be subject to its jurisdiction. To attain this objective, forbidden by Congress and the Supreme Court, the Commission is now saying that any sale of *property* which contains gas in formation is subject to its jurisdiction. Moreover, by the insertion of the parenthetical words "or reserves" the

Commission magnifies the illegality of the conclusion it has reached and directly defies the Supreme Court's opinion in

the *Panhandle* case where "gas leases" and "gas reserves" were considered synonymous and distinguished from sales for resale of natural gas. The boot-strap reasoning which the Commission engages in to justify its assertion of jurisdiction is apparent and is patently unlawful.

The Commission next attempts to justify its assertion of jurisdiction on the ground of administrative expediency (Opinion No. 378, page 9). This ground, when it results in expanding the Commission's statutory jurisdiction, has been rejected by the Courts. See, for example, *Mississippi River Fuel Corp. v. Federal Power Commission*, 202 F. 2d 899. As stated by the Supreme Court in *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 322, "the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." And as further stated by the Supreme Court in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8, "However, respondents correctly point out that Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority

4508

over certain aspects of this field, leaving the residue for state regulation."

VIII.

In its Opinion No. 378 (pages 5-6) the Commission indulges in an obvious misinterpretation of its order of July 14, 1961, reopening these proceedings (26 F.P.C. 167) issued after the decision of the Court of Appeals for the District of Columbia Circuit. This order reopening the

(4508)

proceedings first quotes from the next to the last paragraph of the Court's decision (287 F. 2d at page 146) where the Court stated that "Two courses are open to the Commission." The first course, which contemplated clarification of the order under review, was rejected by the Commission. The second suggested course authorized the Commission to "reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity." In selecting the second course, the Commission stated that it would "reopen the record in this proceeding to afford Texas Eastern an opportunity to make that showing contemplated by the Court's aforequoted latter course."

Thus, the proceedings were reopened in accordance with the Court of Appeals decision. And this is the same Court of Appeals decision which held that the Commission lacked

4509

jurisdiction over the transfer of leases insofar as the producers were concerned. In Opinion No. 378, however, the Commission has attempted to distort the language and intent of its order of reopening by seizing upon the language of the order which purported to define "but not necessarily limit" the issues as justification for considering the question of jurisdiction at this time. The necessary effect of the Commission's action is to accept the Court's decision only in part, and to disregard the portion of the Court's decision which, as we have demonstrated, clearly held the Commission to be without jurisdiction. The Commission also mentions the language in its order reopening the proceeding wherein it referred to whether the certificate should be "reissued in whole or in part." Certainly this language cannot legally be construed to authorize the Com-

mission to follow the Court's decision only "in part" as the Commission does in Opinion No. 378.

IX.

The Commission further seeks to justify its unlawful assumption of jurisdiction on the premise that "the producers transferred natural gas to Texas Eastern for resale by Texas Eastern in the interstate market." In this discussion (Opinion No. 378, pages 6-7) the Commission states that it should look beyond the "label" of the transaction to its essence, and that

4510

"the effect resembles the ordinary sale of gas" because of certain "features" enumerated by the Commission. No one or all of the five asserted "resembling features" set forth by the Commission in any manner transform the assignment and conveyance here involved, which has already been fully consummated, into a contract for the sale of gas for resale, as attempted by the Commission. The transaction was a transfer of leases and not a sale for resale of natural gas and the Commission cannot convert the transaction into a sale for resale.

The short answer to this discussion by the Commission is that if the transaction were a sale for resale there would be no occasion for the Commission to attempt to rescind the transaction and require a sale for resale contract to be entered into. In other portions of Opinion No. 378 (page 2) the Commission clearly recognizes the correct nature of the transaction and its later effort in Opinion No. 378 to convert it into a sale for resale serves only to emphasize the extent to which the Commission has been willing to go in order to enlarge its jurisdiction beyond that conferred by the Natural Gas Act.

4511

On page 11 of Opinion No. 378, in its discussion under the heading "Disposition of These Proceedings" the Commission recites that the "lease sale arrangement should be rescinded" and a "new contract" be entered into. Assuming, *arguendo*, that the Commission has jurisdiction over this transaction (which Marr denies), nevertheless, this requirement is patently unlawful. There is no provision in the Act which authorizes the Commission to direct that binding contracts, such as the Assignment and Conveyance, the Promissory Notes, and the Act of Mortgage and Pledge here involved, be rescinded and a "new contract" be entered into. The Commission has obviously attempted to assume powers not granted to it in the Natural Gas Act. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 338.

Moreover, to compound its erroneous and unlawful assumption of power, the Commission is apparently attempting to make its decision retroactive, for it states, on page 11 of Opinion No. 378, that "The new contract, of course, would be effective from the delivery of the first gas from the Rayne Field and would be a substitute for the lease sale arrangement now proposed." It has been established beyond

4512

controversy that the Commission does not possess any power retroactively to fix rates such as it contemplated by the requirement that a "new contract" be entered into, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618; *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246.

Furthermore, it has been held that any condition attached to a certificate issued by the Commission, such as attempted here to be imposed upon Texas Eastern, must be

consonant with the Commission's authority under other provisions of the Act. *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508; *Central West Utility Co. v. Federal Power Commission*, 247 F. 2d 306; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 204 F. 2d 675, 680. Moreover, it has been judicially determined that in a Section 7 certificate proceeding the Commission must make findings, in accordance with the statute, of present or future, rather than past, public convenience and necessity, *City of Pittsburgh v. Federal Power Commission*, 237 F. 2d 741, 752; *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 236 F. 2d 289, 292.

Under the foregoing and other decisions, which could be cited, the Commission's attempt here to give retroactive effect to its findings is clearly invalid.

4513

XI.

In addition to the ultimate errors in the findings and orders contained in Opinion No. 378 which are of such consequence as to merit the grouping for discussion hereinabove set forth, there are many errors of fact and conclusion which in total contribute to the erroneous action taken by the Commission.

On page 2, paragraph 1, the Commission errs in failing to state the gap in time between the cancellation of Marr's conventional contract of sale of gas and notice of withdrawal of application for certificate of public convenience and necessity on July 16, 1958, and the execution of the Lease Purchase Agreement on December 4, 1958, during which time no interest or claim or contractual right of any kind existed in Texas Eastern in Marr's properties, or the right to gas which might be produced therefrom.

(4513)

By this means the erroneous conclusion is arrived at that there was an uninterrupted process by which Texas Eastern merely "amended its application to reflect a change in its plan for acquiring the Rayne Field gas." In fact, it abandoned its plan to buy gas, and bought leases instead.

On page 2, paragraph 2, the Commission errs in stating that "The difference is solely in contractual arrangements." The difference is one of substance between acquiring

4514

a recognized interest in leases, a real right under the law of Louisiana, and an executory contract to receive personal property (gas) as delivered and to pay by the unit for such personal property after delivery.

On page 2, paragraph 2, it is error to state that "the facilities to be built by Texas Eastern would be essentially the same." Texas Eastern bought, and operates entirely by itself, a gathering system and central dehydration facilities and was required to provide extraction plant processing facilities, none of which were required of it under the former gas sales contracts.

On page 2, paragraph 2, it is error to state that there were only 16 promissory notes, rather than 16 for each seller of gas leasehold interests.

On page 2, paragraph 2, it is error to describe the production payment as "covering all liquids to be extracted from the gas," when in fact it was payable in money, *based on the value of liquids* extracted. Such liquids, being gas throughout the production process, belonged entirely to Texas Eastern when produced from the gas leaseholds, and were not retained by the sellers.

On page 2, paragraph 2, a serious error in referring to the Lease Sale Agreement is made by stating that it "is subject to certain conditions," implying that it is an existing

4515

and operative document. This error continues throughout Opinion No. 378, because of the Commission's failure to recognize that it is nothing more than the familiar "Contract of Sale" by which land is uniformly bought and sold. It was merged by the Assignment and Conveyance on July 27, 1959, and has no present existence. The owner of land holds under his deed, not the preliminary contract of sale. Perhaps the Commission finds it easier to think of cancelling an executory document than one executed over four years ago, but this does not make it so.

On page 2, paragraph 3, the Commission errs in stating that "Based on total recoverable reserves of 990,000 MMcf Texas Eastern acquired approximately 79 percent under the original leasehold acquisition transaction in 1958."

Since Texas Eastern bought leasehold interests, it got the right to produce whatever the leases contained, whether 500 billion Mcf or one trillion and 500 billion Mcf. Neither quantity, estimated or produced, would alter the fact that Texas Eastern acquired the right to produce 100 per cent of the gas covered by each lease, and the total reserves so covered were estimated at 95 per cent of the reserves in the sale area.

The refusal of the Commission to recognize substantial difference between a concept of "reserves" as

4516

"gas in place," and on the other hand at lease rights to produce gas, leads to this error. The first concept is legally impossible, in Louisiana. No one can own gas in place. Conversely, a lease grants the right to produce all the gas one can, including that on which royalty must be paid. There is no "royalty gas" owned as such either in place, or even after production under the typical lease. The lease owner owes royalty in money, based on the value of the royalty fraction of the total.

(4516)

On page 3, the first incomplete paragraph, the Commission errs in construing the leaseholds purchased to cover only 81.5 per cent of the reserves. They cover nearly 100 per cent. It is correct that these leases carry a royalty burden equal to approximately 18 per cent of the reserves. However, the right to this gas as produced inheres in the leaseholds. Texas Eastern does not buy or "pay for it." It accounts in cash, based on a judgment of market value under the lease terms, which may be more or less than 22.6 cents per Mcf through the life of production.

On page 4, paragraph 2, the Commission errs to the extent that its reference to the Examiner's initial decision of June 29, 1962, may imply a finding in Opinion No. 378 that there was a dedication of the Rayne Field gas to the interstate market as of April 22, 1957. No gas was produced by

4517

anyone for delivery to the interstate market before August, 1959, and then only by Texas Eastern.

On page 4, the third complete paragraph, the Commission erroneously refers loosely to an issue of jurisdiction over "the lease sale arrangement." As demonstrated above, this is not descriptive of any identifiable document or set of documents. The operative instruments are an Assignment and Conveyance from Marr to Louisiana Gas, Notes from Louisiana Gas to Marr, Act of Mortgage and Pledge from Louisiana Gas to Marr, and Conveyance from Louisiana Gas to Texas Eastern. It is prejudicial and lacking in specification adequate to inform Marr or a reviewing court as to the meaning of the Commission to refer to an "arrangement." The purpose of the Commission to use this inexactitude to color the characterization it gives a normal mineral rights transaction becomes evident as it proceeds.

On page 4, last paragraph, it is error to hold as to Marr that "what was to be a sale of gas has been converted into a sale of leases." The evidence is undisputed that Marr cancelled his contract and withdrew his application for certificate *unconditionally* on July 16, 1958, without any strings on it or Texas Eastern. Either party was free to walk away for five months thereafter. Texas Eastern's application to reopen in September, 1958, was only in a fond hope of buying Marr's

4518

leases. It had no assurances that it could buy from Marr either leases or gas on that date.

Additionally, the term "conversion" is without specific meaning, beyond the continued and unjustified effort of the Commission to choose terms of coloration to suggest an undisclosed commitment to tie the gas sale to the lease sale. There was none, and there is no evidence of such.

On page 4, last paragraph, Marr objects to the error in the Commission's language purporting to cast aside any evidence of form as being of no substance, saying it is immaterial "whether technically in the form of leasehold transaction or otherwise." This reasoning, if unchallenged, would be equally appropriate to an outright deed to lands containing gas, and to the familiar oil, gas and mineral leases thereof. The forms of real property and mineral law have established meaning in substance which the Commission cannot brush so lightly aside.

On page 6, paragraph 2, the Commission errs in referring to "the in-place sale of the Rayne Field gas to Texas Eastern." There is no legally recognizable sale of gas in place under Louisiana law. One may only own the land or the right to produce minerals therefrom (as by a lease), or one may own gas after severance by production. No one can own, or sell, gas in place. This error is materially

(4518)

prejudicial to Mar in that it shifts words in order to make a lease assignment look like a gas sale.

4519

On page 6, paragraph 2, the Commission errs in its argument that any conveyance of property which may be capable of producing gas must be regulated because it assumes the local law does not so regulate. The "gap" argument, so stated, would apply equally to a sale by simple deed, to the oil and gas lease, to a sale of royalty and to a mortgage. All these transactions are subject to State and local law and cannot, as expert testimony in this case reflects, be arranged at the whim of parties. There is no evidence of any limitation on the right of the state to employ other regulation on transfers of interest in land within its borders. No "gap" is shown, nor any conflict. The two sovereign's powers join precisely here.

On page 6, paragraph 3, the Commission errs in saying that this gas, still in the formation, "was sold in bulk." Gas cannot be sold either in bulk or by the unit while unproduced, under the law of Louisiana. If sold after severance, the only way it could be sold would be on a per Mcf or other unit basis. If unproduced, the only way to obtain the gas is to buy the land, or the leasehold right in land permitting production from the land. The truly prejudicial error is the laying of the foundation in semantics for the slide from "bulk" to "wholesale" at a later point, where the meaning of the latter term is to be given a reincarnation never intended in the Natural Gas Act.

4520

On page 7, numbered paragraph 4, it is error to say that the management agreement provides for Continental to operate "the field," when it is only the assigned leasehold interests to which it applies. Functions of parties Seller in the remainder of the field are not involved. Further,

as pointed out before, Texas Eastern itself operates the gathering system and central dehydration facilities.

On page 7, numbered paragraph 5, the Commission errs in saying Texas Eastern is not bound by the principal obligation. It is not liable personally, but it holds its leases securely bound by note indebtedness and mortgage liens, subject to which it purchased from Louisiana Gas.

On page 8, first complete paragraph, the Commission erred in its interpretation of *Phillips* as referring to "wholesales of natural gas in interstate commerce" as including the instant transaction, regardless of the *Panhandle* case, on the theory that this is a "bulk" sale, which is assumed to be synonymous with a "wholesale." As used in *Phillips* and under the Act, the term "wholesale" relates only to the "sale for resale" provisions.

On page 10, first complete paragraph, there is prejudicial error in the statement that "What is objectionable here is the attempt to disguise a transaction which in effect is a sale of gas by casting it in the form of a sale of

4521

leases * * *." There is no evidence to support this charge of devious purpose. All the evidence is that this transaction has been exposed for the public view since 1958. No single concealed purpose, sub-rosa action, or misrepresentation beneath the facts shown in the documents exists. Unless one accepts the evident Commission view that it should regulate all natural gas properties contra *Panhandle*, there is no "disguise" involved in refusing to sell gas in interstate commerce. There is no questionable device presumed when one sells his leases in preference to selling gas. If there is, a "natural gas company" now is anyone owning land under which there may be gas. He cannot even turn away by trying to sell the land. This is a "disguise" only in terms of an unwarranted grab for ungranted power by the administrative agency.

(4521)

On page 11, finding (1), it is erroneous to find that Marr is a producer of natural gas and a natural gas company "by participation in the Lease Sale Agreement" for reasons set forth heretofore.

On page 11, finding (2), the Commission wrongfully finds that "The Lease Sale Agreement referred to above represents sales of natural gas for resale in interstate commerce," for reasons discussed above.

4522

On page 12, finding (7), the Commission erroneously describes Marr and other sellers as "suppliers of gas," for reasons fully presented in this application.

XII.

As shown above, the requirements of the Commission's Opinion No. 378 and accompanying order would cause Marr substantial and irreparable injury by requiring that he enter into a new and different contract to be substituted for the lease sale agreement on a *nunc pro tunc* basis to be effective as of the date of the commencement of deliveries of natural gas from the Rayne Field. It is abundantly clear that such a requirement would have a serious adverse impact upon Marr's financial situation not just confined to the Rayne transaction but others which have been entered into as a result of the consummation of that agreement. Positions have been taken, money has been expended and obligations assumed all as a result of the execution of the lease sale agreement.

It is equally clear that the action taken by the Commission here can be regarded as of first impression, is without precedent, is new and novel and for the reasons set forth above, involves serious and substantial questions as to its validity and whether it will withstand the test of judicial scrutiny. Consequently, to preserve the *status quo* pending a

4523

final determination of these matters, it is necessary that a stay of Opinion No. 378 and the accompanying order of February 6, 1963 be granted. .

WHEREFORE, for all of the foregoing reasons, M. H. Marr requests the Commission to grant this application for rehearing and to reverse and set aside its Opinion No. 378 and accompanying order. If the Commission should not grant this application, M. H. Marr requests that the Commission stay Opinion No. 378 and the accompanying order pending judicial review.

Respectfully submitted,

M. H. MARR

By DONLEY C. WERTZ
Donley C. Wertz
His Attorney

DONLEY C. WERTZ
2500 Republic National Bank Building
Dallas, Texas

MAY, SHANNON and MORLEY
1700 K Street, N. W.
Washington 6, D. C.
Attorneys for M. H. Marr

4524

DISTRICT OF COLUMBIA, SS:

Donley C. Wertz, being first duly sworn, deposes and says that he is an attorney for M. H. Marr; that as such he has signed the foregoing "Application for Rehearing and Stay of M. H. Marr" for and on behalf of M. H. Marr; that he is authorized so to do; that he has read said Application and

(4524)

is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

DONLEY C. WERTZ
Donley C. Wertz

Subscribed and sworn to before me, a Notary Public, this
7th day of March, 1963.

THOMAS C. EVANS
Thomas C. Evans
Notary Public

(Seal)

My Commission expires September 14, 1965.

4525-4528

CERTIFICATE OF SERVICE

4529

Docketed March 8, 1963

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-12446, G-12447, G-12432

TEXAS EASTERN TRANSMISSION CORPORATION
CONTINENTAL OIL COMPANY

Application by Texas Eastern Transmission Corporation for
Rehearing of Opinion No. 378 and Order Issued February
6, 1963

4530-4531

INDEX

4532

Now COMES Texas Eastern Transmission Corporation (Texas Eastern), pursuant to Section 1.34 of the Commission's Rules of Practice and Procedure and Section 19(a) of the Natural Gas Act, and files this its Application for Rehearing complaining of the Commission's Opinion No. 378 and order issued in the above captioned proceeding on February 6, 1963.

SPECIFICATION OF ERRORS

1. The Commission erred in finding that it is not in the public interest for the Commission to certificate a transaction such as the one presented to it on the record in this case.
2. The Commission erred in finding that the Rayne Field transaction is not in the public interest as a way to acquire gas supplies.
3. The Commission erred in finding that it was free to re-examine the jurisdictional question related to the Rayne Field lease acquisition and to reverse the non-jurisdictional finding of its former

4533

Opinion No. 322 issued June 23, 1959, as well as the finding of the Court of Appeals that "the Commission has been held to lack jurisdiction over gas leases."

4. The Commission erred in finding that the jurisdictional issue was comprehended in the issues set for trial and determination by its order of July 14, 1961, reopening the record in these proceedings.
5. The Commission erred in failing to follow the mandate of the Court of Appeals.

(4533)

6. The Commission erred in finding that the sale of the Rayne Field leases by Continental, Sun, Marr and General Crude represents sales of natural gas for re-sale in interstate commerce which are subject to its jurisdiction under the Natural Gas Act.
7. The Commission erred in finding that the present case is distinguishable from that involved in *FPC v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498.
8. The Commission erred in holding that the Rayne Field lease acquisition constituted an attempt to disguise a transaction which, in effect, is a sale of gas.
9. The Commission erred in holding that the Rayne Field lease sale arrangement should be rescinded.
10. The Commission erred in finding that a lease sale arrangement consummated prior to the inauguration by

4534

the Commission of the area approach to regulation must be revised in some unspecified manner to conform to area price regulation.

11. The Commission erred in attempting to require the formulation of a different means for Texas Eastern's acquiring gas supplies.
12. The Commission erred in requiring Texas Eastern and the producers to enter into a new contract in substitution for the lease sale arrangement.
13. The Commission erred in holding that it will now be necessary for the producers to file an application for a certificate of public convenience and necessity pursuant to Section 7 of the Natural Gas Act.
14. The Commission erred in requiring Texas Eastern to file a revised application for a certificate to put into

effect a new arrangement for the supply of gas to Texas Eastern from the Rayne Field.

15. The Commission erred in failing to find that the acquisition costs of the Rayne Field leases are consistent with the public convenience and necessity.
16. The Commission erred in failing to reissue the certificate of public convenience and necessity issued by its Opinion No. 322.

4535

ARGUMENT

The Commission's Opinion No. 378 is based upon hindsight rather than the evidence of record in this proceeding. The Commission has further erred in attempting to treat the Rayne Field lease acquisition as a proposal to purchase leases rather than a final, irrevocable sale completed more than three and one-half years ago. The Commission has also exceeded its authority in attempting to overrule the existing law of the land established by the Supreme Court's decision in *FPC v. Panhandle Eastern Pipe Line Company*, 337 U.S. 498, and the law of this case established by its prior Opinion No. 322, 21 FPC 860, and the decision of the United States Court of Appeals for the District of Columbia Circuit, *PSC v. FPC*, 287 F. 2d 143. In addition, the Commission committed error in reversing the findings of its former Opinion No. 322.

- A. *The Commission erred in finding that the Rayne Field lease acquisition is not in the public interest.*

The uncontradicted evidence establishes that under the particular facts and circumstances existing at the time with respect to Texas Eastern's system, the purchase of the Rayne Field leases was a reasonable and prudent investment by Texas Eastern's management in the best interest

(4535)

of its customers. For example, by acquiring the Rayne Field leases, Texas Eastern gained access to a very large gas supply ideally located on its system at a cost to the ultimate consumers in line with the cost of a large blocks of existing gas supplies then connected to its system and far less than the cost which would have been incurred in purchasing any then available comparable gas sup-

4536

plies. Moreover, by acquiring the leases, Texas Eastern avoided a disastrous favored nation triggering of existing gas purchase contracts which would have occurred if it had purchased the Rayne Field gas or any other then available gas supplies under conventional gas purchase contracts. At the same time the lease acquisition assisted Texas Eastern in avoiding take or pay problems which are now plaguing many other members of the industry.

The foregoing are but a few of the many advantages which the Commission and Texas Eastern's customers recognized when they announced their approval of the Rayne Field lease acquisition. It may be that in the light of the changed circumstances presently existing more than three and one-half years since the lease acquisition, the Commission and some of Texas Eastern's customers feel that it would not be in the public interest for Texas Eastern to now acquire the leases. We disagree. However, it is idle to speculate on whether the lease acquisition would be prudent today. The leases were irrevocably acquired by Texas Eastern long ago. The prudence of the investment and whether it was in the public interest must be judged solely on the basis of the facts in existence at the time of the acquisition. The law does not permit the Commission the privilege of hindsight. *Kerr v. South Park Commr's.*, 177 U.S. 379, and *International Paper Co. v. U. S.*, 227 F. 2d 201 (CA 5). The Commission's former Opinion No. 322 contains exhaustive findings in support of its conclusion

that the acquisition of the Rayne Field leases was in the public interest under then existing circumstances. It erred in reversing such opinion without the benefit of any substantial evidence to support the reversal.

4537

B. The Commission cannot reexamine the jurisdictional question related to the Rayne Field lease acquisition.

At the time Texas Eastern acquired the Rayne Field leases it was conceded by the Commission and all parties, including the New York Public Service Commission, that the lease sale was beyond the jurisdiction of the Commission.¹ In reliance upon the Commission's express findings in its Opinion No. 322 that it had no jurisdiction over the lease acquisition, Texas Eastern and the sellers irrevocably changed their positions by closing the transaction on July 27, 1959. The Commission's findings as to its lack of jurisdiction were subsequently affirmed by the Court of Appeals for the District of Columbia Circuit.

Under the foregoing circumstances, the Commission's belated decision to reexamine the jurisdictional question in its Opinion No. 378 does violence to all principles of law and equity. In reaching its decision to reexamine this issue, the Commission rationalizes that it "was hardly considered in the earlier phase of this proceeding," and "was given but passing mention by the Commission and the Court." (Op. p. 5). We respectfully submit that full consideration was given to the issue by both the Commission and the Court. However, we do not believe that adequacy of consideration can be made a criterion. The controlling fact is that the issue was considered and

¹ In its application for rehearing of Opinion No. 322 the New York Public Service Commission stated that " * * * the Commission correctly observed that 'Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate' * * * ." (App. p. 3).

decided. Acting in good faith upon the decision, the parties changed their positions and would now suffer irreparable harm by a reversal of the decision.

The Commission also relies upon *NLRB v. Baltimore Transit Co.*, (CA 4) 140 F. 2d 51, and *FPC v. Pottsville Broadcasting Co.*, 309 U.S. 134, as authority for its reexamination of the jurisdictional question. Such cases are not germane. Each deals with the power of a regulatory agency upon remand to consider issues not considered or passed upon by the appellate court. In the instant case the Commission recognizes that the Court of Appeals considered and passed upon the jurisdictional question of the lease acquisition. (Op. pp. 5, 10). Its decision upon this issue thus became the law of the case, and its mandate expressly prohibits the Commission from reexamining and deciding the issue in a manner "inconsistent with the opinion." The Commission erred in ignoring these established legal principles.

C. The Rayne Field lease acquisition was not subject to the jurisdiction of the Commission.

If it is assumed, *arguendo*, that the Commission had the right to reexamine the jurisdictional question, the Commission nevertheless erred in finding that the sale of the Rayne Field leases was subject to its jurisdiction. This finding is based upon the reasoning that (1) the present case is distinguishable from that involved in *FPC v. Panhandle Eastern Pipe Line Company*, (2) the *Panhandle* case has been overruled, and (3) the lease sale is an attempt to disguise a transaction which, in effect, is a sale of gas. (Op. pp. 7, 8, 10).

The invalidity of each of the aforementioned reasons is shown

below:

- (1) *The present case is not distinguishable from the Panhandle case.*

The Commission attempts to distinguish the *Panhandle* case upon the ground that "in that case the leases were undeveloped so that the transfer did not resemble a sale of gas as did the sale of developed leaseholds here" (Op. p. 7). Clearly, this is no distinction at all. In the *Panhandle* case the Supreme Court stated that the issue before it for decision was as follows:

"Specifically the question to be decided is whether a natural-gas company, subject to the Act, may sell the leases covering an estimated twelve per cent of its total gas reserves without the approval and contrary to an order of the Commission." (337 U.S. 498, 499).

Obviously, the sale by *Panhandle* of "leases covering an estimated twelve per cent of its total gas reserves" resembled a sale of gas just as much as did the sale of the Rayne Field leases to Texas Eastern. The stage of development of the *Panhandle* leases is of no consequence to the determination of the issue of whether gas was sold. The controlling fact is that the reserves underlying the *Panhandle* leases were proven at the time of the sale. Yet, despite the fact that the leases were known to cover a defined block of gas, the Supreme Court held the sale to be beyond the jurisdiction of the Commission. By the same token the sale of the Rayne Field leases was also beyond the Commission's jurisdiction.

The Commission also attempts to distinguish the *Panhandle* case upon the contention that "the reserves here are connected or are to be connected to an interstate pipeline and are to be sold in interstate

commerce, while those in *Panhandle* were transferred to a corporation which subsequently sold them in intrastate commerce." (Op. pp. 7, 8). That these facts cannot form the basis for a distinction will be apparent from the following observations by the Supreme Court in the *Panhandle* case:

"It is pointed out that *Panhandle* in three applications for certificates of convenience and necessity to construct additional pipe-line facilities had included the acreage here involved as part of its gas reserves, and certificates were issued upon the finding by the Commission that *Panhandle* had adequate reserves to warrant its expansion. Moreover *Panhandle* had been permitted to include these reserves in its rate base as 'used and useful property.'" (337 U.S. 498, 507).

It should also be noted that in the *Panhandle* case, *Panhandle Eastern Pipe Line Company* reserved "the option to purchase on or after January 1, 1965, all or part of the gas produced * * ." from the leases transferred to *Hugoton Production Company*. (337 U.S. 498, 500). Thus, in the *Panhandle* case the leases had already been committed to interstate commerce at the time of the sale and the seller retained the right to connect the gas to its interstate pipeline system after the sale. Clearly, the *Panhandle* leases were more closely tied to interstate commerce at the time of the sale than were the *Rayne Field* leases.

Finally, the Commission rationalizes that "in the *Panhandle* case the gas reserves passed entirely out of the control of the seller while here the seller retained rights to oil, gas if found other than in particular strata, production payments for liquids, and management of the field." (Op. p. 8). We submit that this too is an invalid

4541

basis for distinguishing the *Panhandle* case. The uncontradicted testimony of Mr. John T. Guyton, a distinguished Louisiana attorney, establishes that the Assignment and Conveyance of the Rayne Field leases to Texas Eastern was valid under Louisiana law and that Texas Eastern succeeded to all rights of the sellers "with respect to all gas produced from all formations between the surface of the ground and the base of the Nodosaria 'A' sand, subject only to the payment of such royalties, overriding royalties and production payments as have been provided by the contract." (Ex. M-11, Tr. 1400). At the time of the conveyance no gas reserves had been discovered below the base of the Notosaria "A" sand. Thus in Rayne as in *Panhandle*, the known gas reserves passed entirely out of the control of the sellers. The fact that the sellers of the Rayne Field leases retained rights unrelated to the known gas reserves is immaterial to the jurisdictional issue.

(2) *The Panhandle case has not been overruled.*

The Commission's speculation that perhaps the *Panhandle* case was overruled by the Supreme Court's later decision in *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, completely overlooks the fact that in the *Phillips* case the Supreme Court cited and relied upon its decision in the *Panhandle* case (347 U.S. 672, 678). Surely, if the Court had intended to overrule the *Panhandle* case, it would have said so. Moreover, in the instant case, the Court of Appeals expressly cited and distinguished the *Phillips* and *Panhandle* cases (287 F. 2d 143, 145).

4542

The Commission's references to *Saturn Oil & Gas Co. v. FPC*, 250 F. 2d 61 (CA 10) and *Continental Oil Co. v. FPC*, 266 F. 2d 208 (CA 5) are irrelevant (Op. p. 8). Such

(4542)

cases dealt with sales of gas under conventional contracts and have no bearing whatsoever upon the question of whether a sale of leases is jurisdictional. More apropos is the fact that in each of its Annual Reports to the Congress for the years 1950 through 1962, the Commission has advocated legislation which would grant it jurisdiction over transfers of leases and natural gas reserves and various unsuccessful bills have been introduced in the Congress to accomplish this Commission aim. This interpretation by the Commission of its lack of jurisdiction over lease transfers together with the acquiescence of the Congress in that interpretation is, of course, entitled to great weight. *Mississippi Valley Gas Co. v. FPC*, 294 F. 2d 588 (CA 5) and *Gas Service Co. v. FPC*, 282 F. 2d 496 (CADC). Clearly, therefore, the *Panhandle* case is still binding upon the Commission and must be followed by it.

(3) *The Rayne Field lease sale was a bona fide transfer of leases.*

The Commission's finding that the Rayne Field lease purchase constituted an attempt to disguise a transaction which, in effect, is a sale of gas (Op. pp. 6, 7, 10) completely ignores the evidence of record in this proceeding and the Commission's prior findings in its Opinion No. 322, 21 FPC 860. Mr. John T. Guyton's testimony conclusively establishes that under Louisiana law a lease sale

4543

does not operate to convey title to the minerals, but only the exclusive right to explore for and produce the minerals. Thus, by no stretch of the imagination can the sale of leases in Louisiana be likened to a sale of gas. The opinion of Mr. Guyton's law firm in this connection is as follows:

"In Louisiana, under a commercial oil, gas and mineral lease similar to those above referred to, the lessee (including his successors, assigns or sublessees)

has the exclusive right to go upon the leased premises, to explore for oil and gas by drilling, to develop the premises for the production of oil and gas, to produce such minerals, and upon production, to reduce such minerals to possession and ownership, and to market same, subject to the payment of such royalties as the lessor may have reserved and of such overriding royalties and production payments as the lease may be burdened with. The lease itself, immediately upon its execution, *does not convey title to the subsurface minerals to the lessee*; but it does convey the exclusive right to explore for and produce minerals, and, upon production, to reduce the minerals to possession and ownership and to market same. (See *McCoy v. United Gas Public Service Co.*, U.S.D.C., W. D. La., 57 F. Supp. 444; *Dixon v. American Liberty Oil Co.*, 226 La. 911, 77 So. 2d 533 (1954) and cases cited therein)." (Ex. M-11). (Emphasis supplied).

Mr. John Jacobs, Vice President in charge of Texas Eastern's Gas Supply and an attorney, also testified at length as to the many fundamental differences between a purchase of leases and a purchase of gas (Tr. pp. 1621-1659). Further, in summarizing some of the many differences between the Rayne Field lease acquisition and a conventional gas purchase contract, the Commission, in its brief before the Court of Appeals in this case, stated:

"Whatever the precise unit cost turns out to be, the form of the acquisition offers several distinct advantages to Texas Eastern, the consumers served by its system, and to segments of the public not directly involved herein (R. 1356-1358, 1622-1623, 1625-1626, 1632-

4544

1636). Contracts to sell natural gas usually contain escalation provisions of one sort or another and thus

pose the prospect of increasing and uncertain gas prices over the life of the contract. The acquisition of leases, coupled with the provisions for deducting amounts covering the annual expenses of operating Rayne field from the production payment, assured Texas Eastern of a fixed cost. Contracts to sell gas today oblige the purchaser to take a minimum volume when offered or pay for it as if taken. Increasingly high minima cause an inflexibility in a pipeline company's gas supply which acquisition of leases avoids. *Being its own producer, Texas Eastern will be in a position to regulate its takes in terms of the seasonal and cyclical needs of its system.* (Cf. R. 1732, 1772). Moreover, while gas purchases could activate 'favored-nations' and other indeterminate pricing clauses in prior contracts, the purchase of leases cannot have such effect on either Texas Eastern's or other pipeline companies' outstanding contracts." (Br. pp 9, 10)

"The Commission found nothing unusual about a pipeline company's owning and producing leaseholds for a portion of its gas supply; it found the form of the lease transfer not to be unique in the oil and gas business; and it found the entire transaction to have been conducted at arm's length (R. 3721, 21 FPC 867). The Commission noted, as further benefits to Texas Eastern's customers and the public, and the lease purchase transaction avoided future contractual escalations of field price; added flexibility to Texas Eastern's overall operations; and eliminated the chance of 'triggering' escalations under 'favored-nation' clauses of Texas Eastern and other pipeline gas purchase contracts. (R. 3720, 21 FPC 866-7).

"Finally, the Commission found that 'public convenience and necessity' required Texas Eastern's proposed construction and operation of facilities and sales of gas (R. 3723, 21 FPC 868)." (Br. p. 13).

Nothing has transpired since the issuance of the Commission's Opinion No. 322 which would operate to change or obliterate any of the aforementioned advantages and features which distinguish the Rayne Field lease sale from a sale of gas. The Commission erred in ignoring these distinguishing features and further erred in over-

4545

ruling its prior Opinion No. 322 without the benefit of any evidence of record to support its action.

D. The Commission has no authority to require the parties to rescind the Rayne Field lease acquisition and enter into some other type of unspecified arrangement.

Even if it is assumed, *arguendo*, that the Rayne Field lease sale is subject to the jurisdiction of the Commission, it is crystal clear that the Commission has far exceeded the bounds of its authority under the Natural Gas Act in attempting to require Texas Eastern and the sellers of the Rayne Field leases to rescind the transaction and enter into some new, unspecified type of contract. (Op. p. 11).

The only predicate laid by the Commission for its drastic directive consists in its observations that "it is indeed difficult to envision how we could exercise our regulatory authority within the framework of such an arrangement" and "sales under the arrangements herein contemplated could not readily be adjusted to our determination of just and reasonable rates in an area rate proceeding and they would thus escape effective rate regulation." (Op. p. 9).

(4545)

The Commission apparently overlooks the salient fact that the sellers of the Rayne Field leases are not here seeking a certificate to make a "contemplated" sale of gas which perhaps could be conditioned by requiring changes in a proposed contract. Instead, the sale of the Rayne Field leases was consummated on July 27, 1959. If the sale of the leases was subject to the jurisdiction of the Commission, which is denied, it became so at that time. Thus, if the Commission has the power to regulate, it can only

4546

regulate that which is in existence. It cannot order the parties to retroactively create a jurisdictional sale more amenable to its regulatory policies.

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* (350 U.S. 332, 341), the Supreme Court made it quite clear that the Commission has neither a "rate making" nor a "rate changing" power. Quite the contrary, the Court specifically pointed out that the Natural Gas Act preserves "the integrity of contracts" (350 U.S. at 244). The Court further admonished that the Natural Gas Act should be construed as follows:

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." (350 U.S. at 338).

The fact that the Rayne Field lease sale might not fit in with the area rate regulatory philosophy adopted by the Commission subsequent to the sale does not authorize the Commission to exceed its jurisdiction under the Natural Gas Act. The *Mobile* case makes it quite clear that the Commission erred in requiring that the Rayne Field lease

sale be abrogated and in ordering Texas Eastern and the sellers to enter into a new arrangement for the sale of the gas.

- E. *The Commission erred in failing to find that the acquisition cost of the Rayne Field leases was consistent with the public convenience and necessity and further erred in failing to reissue the certificate issued by its Opinion No. 322.*

4547

For the reasons heretofore set forth in Texas Eastern's briefs and in its exceptions to the examiner's decision issued June 29, 1962, it has been conclusively established that the acquisition cost of the Rayne Field leases was consistent with the public convenience and necessity and the certificate issued by the Commission's Opinion No. 322 should, therefore, be reissued in its entirety. We shall not further belabor the points in our briefs and exceptions. However, we earnestly request the Commission to again review them in its consideration of this Application for Rehearing.

CONCLUSION

For the foregoing reasons, Texas Eastern respectfully prays:

- (1) That a rehearing be granted with reference to the Commission Opinion No. 378 and order issued herein on February 6, 1963;
- (2) That on said rehearing the Commission withdraw said Opinion No. 378 and order issued February 6, 1963, and issue a new opinion and order finding that the acquisition cost of the Rayne Field is consistent with the public convenience and necessity and re-issuing to Texas Eastern the certificate of public convenience and necessity heretofore issued by the Com-

(4547)

mission's Opinion No. 322 and order of June 23, 1959, in these proceedings; and

- (3) That Texas Eastern have such other and further re-

4548

lief that may appear to the Commission to be just and proper.

Respectfully submitted,

JACK D. HEAD

Jack D. Head

Vice President and General Counsel

Texas Eastern Transmission

Corporation

P. O. Box 2521

Houston 1, Texas

Of Counsel:

W. D. DEAKINS, JR., *Esquire*

Vinson, Elkins, Weems & Searls

First City National Bank Building

Houston 2, Texas

KEITH M. PYBURN, *Esquire*

Texas Eastern Transmission Corporation

Suite 852, Pennsylvania Building

Washington 4, D. C.

JOSEPH F. WEILER, *Esquire*

Texas Eastern Transmission Corporation

P. O. Box 2521

Houston 1, Texas

MARTIN L. FRIEDMAN, *Esquire*

Chapman and Friedman

932 Pennsylvania Building

Washington 4, D. C.

Dated: March 6, 1963.

4549

VERIFICATION

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE Me, the undersigned authority, on this day personally appeared Jack D. Head, who, being by me first duly sworn, on oath deposes and says:

That he is Vice President and General Counsel for Texas Eastern Transmission Corporation in the foregoing Application for Rehearing of Opinion No. 378 and Order Issued February 6, 1963; that as such, he is authorized to verify and file the same with the Federal Power Commission; that he has read said Application and is familiar with the contents thereof; and that all averments of fact therein contained are true to the best of his knowledge, information and belief.

JACK D. HEAD
Jack D. Head

SWORN TO AND SUBSCRIBED before me on this 6th day of March, 1963

(SEAL)

FLORRIS H. PLOWMAN
Florris H. Plowman

*Notary Public in and for
Harris County, Texas*

My Commission Expires June 1, 1963

(4555)

4555

[Docket Apr. 2, 1963]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman;
L. J. O'Connor, Jr., Charles R. Ross, and Harold C.
Woodward.

Docket Nos.

TEXAS EASTERN TRANSMISSION
CORPORATION
CONTINENTAL OIL COMPANY

G-12446, G-12447
G-12432

Order Granting Applications for Rehearing

(Issued April 2, 1963)

Applications for rehearing have been filed by Texas Eastern Transmission Corporation, Continental Oil Company, Sun Oil Company, General Crude Oil Company, and M. H. Marr with respect to our Opinion No. 378 and Order issued February 6, 1963. In our opinion we found that the arrangement by which the producers conveyed leasehold interests in the Rayne Field to Texas Eastern was in reality a sale for resale in interstate commerce subject to our jurisdiction, and we therefore deferred decision on Texas Eastern's application for a certificate until the company and the producers should enter into a new arrangement and make appropriate filings.

Continental argues that our order of July 14, 1961, 26 FPC-167, gave it no notice that jurisdiction was to be considered in the remanded proceedings, that it was only a nominal party and did not participate in the remanded proceedings, and that it was surprised and denied due process with respect to the jurisdictional issue. It also contends that Sun, Marr and General Crude were also denied due

process and were improperly ordered to make filings although they were not parties. Marr likewise objects to lack of notice or opportunity for a hearing and also contends that it has been denied due process of law.¹

We think there is no merit to the contentions that the jurisdictional question was not in issue in the remanded proceedings, and certainly Continental as a party thereto was or should have been aware that its role of being only "nominally a party" in the case was being seriously challenged by the staff. The other three producers probably also had

4556

actual knowledge that the status of their sale to Texas Eastern was being raised before the Commission. While we doubt that any of the producers were deprived of due process, this is a matter of first impression and the Commission, having previously permitted Sun, Marr and General Crude to withdraw their applications to make jurisdictional sales to Texas Eastern, has taken no express action to insure that they were made parties to the reopened proceedings. In the special circumstances of this case we believe we should take extra precautions to assure that the producers have had a full opportunity to present their case.

As indicated by the applications for rehearing, our opinion and order made Sun, Marr and General Crude parties to these proceedings and we shall treat them as such. All four of the producers have argued at length the jurisdictional question raised by the record in this proceeding on legal grounds in their applications for rehearing and nothing in their petitions persuades us that on the basis of the facts presently before us we should reconsider Opinion No. 378. Indeed the subsequent decision of the

¹ Sun and General Crude do not request rehearing on the ground that they were not parties or did not receive appropriate notice that the jurisdictional question was in issue.

(4556)

Supreme Court in *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, U.S. , No. 62, February 18, 1963, emphasizes the broad nature of our exclusive jurisdiction. However, Continental and Marr indicate that they desire a hearing to supplement the record even though they have not indicated in what respect the record is incomplete. Before making further disposition of these proceedings we shall therefore grant rehearing to afford the four producers an opportunity to show whether a proper resolution of this matter requires a further evidentiary hearing. To this effect we shall require that they file within 30 days of this order a further pleading setting forth the nature of the evidence they propose to submit and what they intend to prove by such evidence at any further hearing in this proceeding so that we may determine whether any further evidentiary hearing is necessary. Such evidence should be confined to whether we have jurisdiction over the transaction between the producers and Texas Eastern presently before the Commission, whether the present lease sale type of arrangement is in the public interest and whether it may be rescinded. Evidence from the producers on price or rate levels for this sale, assuming it is to be jurisdictional, is not appropriate at this stage of the proceedings, nor is evidence of other arrangements which might be made between the parties in accordance with our Opinion No. 378.

If it appears that significant new evidence relevant to the issues referred to above will be introduced, we shall set the case for further hearing and simultaneously specify the procedure for further action in the case. Since Texas Eastern's application for a certificate is closely connected with the resolution of the jurisdictional question, we shall also grant its application for rehearing subject to the provisions of this order.

4557

The Commission further finds:

It is in the public interest that the applications for rehearing filed by Texas Eastern, Continental, Sun, Marr, and General Crude be granted subject to the procedures discussed above and set forth in paragraph (B) below.

The Commission orders:

(A) The applications for rehearing filed by Texas Eastern, Continental, Sun, Marr and General Crude are hereby granted subject to the procedures discussed above and set forth in paragraph (B) below.

(B) If Continental, Sun, Marr or General Crude desire a further evidentiary hearing, they shall notify the Commission within 30 days of the issuance of this order setting forth specifically the nature of the evidence which they propose to introduce, and what they intend to prove thereby. The evidence shall be confined to the following issues: (1) Whether the Commission has jurisdiction over the sale of leases to Texas Eastern, (2) whether the lease sale type of arrangement between the producers and Texas Eastern is in the public interest, and (3) whether the lease-sale arrangement may be rescinded and another arrangement substituted. The evidence shall not include cost data or other data in support of a particular price or rate level, or evidence of other arrangements between the parties.

By the Commission. Commissioner Woodward not participating.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

(SEAL)

(4558)

4558

Docketed April 15, 1963

BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

Docket
Nos.

TEXAS EASTERN TRANSMISSION CORPORATION

G-12446,
G-12447

and

CONTINENTAL OIL COMPANY

G-12432

Application for Rehearing of M. H. Marr

Comes now M. H. Marr (Marr), pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Rules of Practice and Procedure, and hereby applies for rehearing of the Commission's order entered in the above-entitled proceedings on April 2, 1963. In support of this application Marr shows as follows:

I.

Although such order of April 2, 1963 is entitled "Order Granting Applications for Rehearing" the practical effect of such order is a denial of Marr's application for rehearing filed herein on March 7, 1963 and directed to the Commission's Opinion No. 378 and accompanying order of February 6, 1963.

4559

The April 2, 1963 order is no more than a reiteration and further perpetuation of the fundamental error committed in the February 6, 1963 decision, that is, to expand the scope of the remanded proceedings following the decision of the Court of Appeals for the District of Columbia

Circuit in *Public Service Commission v. Federal Power Commission*, 287 F. 2d 143, far beyond the limitations of that Court's mandate.

As made abundantly clear in Marr's earlier application for rehearing (pp. 7-9, 20-21), the question of whether the Commission has jurisdiction over the Rayne Field lease sale transaction was decided by the Commission in its first decision in this proceeding (21 F.P.C. 860). The Commission's conclusion there that it did not have jurisdiction over the lease transaction was upheld by the Court of Appeals. The issue was thus closed. The decision on this issue became the law of the case and was binding thereafter upon the Commission, *National Labor Relations Board v. Brown & Root, Inc.*, (C.A.D.C. 1953), 204 F. 2d 139, 146.

4560

II.

By the April 2, 1963 order purporting to grant rehearing the Commission appears to be attempting to circumvent its procedural errors committed earlier by specifically stating the question of jurisdiction to be an issue in this case. But the Commission cannot utilize such "boot-strap" procedures to justify reexamination and further exploration into an issue which it previously decided and which decision was judicially affirmed.

Such order would apparently afford Marr an opportunity to present evidence directed to the question of whether the Commission has jurisdiction over the lease sale transaction. In other words, Marr would be permitted to submit evidence designed to persuade the Commission that it does not have jurisdiction over the lease sale.

Despite the fact that it is abundantly clear that the Commission has a closed mind on this subject, the procedure

(4560)

prescribed is erroneous, unjustified and illegal first, because the question is no longer open for consideration and, in any event, such procedure represents an effort by the Commission to shift the burden of proof. The question

4561

of jurisdiction is one which the Commission must show affirmatively and cannot be assumed in the absence of a negative showing by the person against whom jurisdiction is asserted. Marr cannot be required to prove by an evidentiary showing that the Commission does not have jurisdiction over the lease sale transaction.

III.

With respect to the other two issues framed by the Commission, namely, "whether the lease-sale type of arrangement between the producers and Texas Eastern is in the public interest" and "whether the lease-sale arrangement may be rescinded and another arrangement substituted," Marr stands upon the contentions made in his application for rehearing filed in these proceedings on March 7, 1963 which application is incorporated herein and made a part hereof by reference. Once it is recognized that the Commission has no jurisdiction over the lease sale transaction there is no need for further inquiry into other collateral matters.

It is perfectly obvious that the form of the "rehearing" purportedly granted by the Commission's order of April 2, 1963 is in no manner the type of relief sought by Marr and Marr has nothing to gain by submitting a notice as contemplated by Paragraph (B) of such order and no such notice will be submitted.

4562

WHEREFORE, Marr requests that the Commission rescind its order of April 2, 1963 and find and determine that it

has no jurisdiction over the Rayne Field lease sale transaction. It is further requested that a stay of the Commission's Opinion No. 378 and accompanying order of February 6, 1963 be granted for the reasons heretofore stated in Marr's application for rehearing filed in this proceeding on March 7, 1963.

Respectfully submitted,

M. H. MARR

By DONLEY C. WERTZ
Donley C. Wertz
His Attorney

DONLEY C. WERTZ
2500 Republic National
Bank Building
Dallas, Texas

MAY, SHANNON AND MORLEY
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for M. H. Marr

4563

DISTRICT OF COLUMBIA SS:

Donley C. Wertz, being first duly sworn, deposes and says that he is Attorney for M. H. Marr; that as such he has signed the foregoing "Application for Rehearing of M. H. Marr" for and on behalf of M. H. Marr; that he is authorized so to do; that he has read said Application and is familiar with the contents thereof; and that the matters

(4563)

and things therein set forth are true and correct to the best of his knowledge, information and belief.

DONLEY C. WERTZ
Donley C. Wertz

Subscribed and sworn to before me, a Notary Public, this 15th day of April, 1963.

(SEAL)

THOMAS C. EVANS
Thomas C. Evans
Notary Public

My Commission expires September 14, 1965.

4564-4567

CERTIFICATE OF SERVICE

4568

Docketed April 17, 1963

BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

	Docket Nos.
TEXAS EASTERN TRANSMISSION CORPORATION	G-12446, G-12447
CONTINENTAL OIL COMPANY	G-12432

Application for Rehearing and Stay by Sun Oil Company

Comes now Sun Oil Company (Sun) and, pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, being aggrieved, hereby applies for rehearing and stay of the Commission's order in the above-entitled proceedings, issued on April 2, 1963. In support of this application for rehearing, Sun states as follows:

I.

As the Commission's order issued April 2, 1963 recognizes, Sun did not, in its application for rehearing and stay of the Commission's Opinion No. 378 and accompanying order, request an "evidentiary hearing" in this case, nor is such a request an "evidentiary hearing" in this case, nor is such a request made at this time. Therefore, this application for rehearing and stay may be considered as notification by Sun, pursuant to Ordering Paragraph (B) of the order

4569

issued April 2, 1963, to the extent such paragraph may be lawful, that Sun does not desire an "evidentiary hearing" as described in and under the limitations imposed by the Commission's order, which are obviously not within the Commission's authority under the Act. Sun hereby reserves all of its rights accorded under the Natural Gas Act, the Administrative Procedure Act and the Fifth Amendment to the Constitution of the United States to participate fully at any and all lawful hearings which the Commission might hold involving this transaction.

II.

The order issued April 2, 1963 is misleadingly entitled "Order Granting Applications for Rehearing." Contrary to its caption, the order denies Sun's Application for Rehearing and Stay of Opinion No. 378 and accompanying order by specific language, as follows:

"As indicated by the applications for rehearing, our opinion and order made Sun, Marr and General Crude parties to these proceedings and we shall treat them as such. All four of the producers have argued at length the jurisdictional question raised by the record in this proceeding on legal grounds in their applications for

(4569)

rehearing and nothing in their petitions persuades us that on the basis of the facts presently before us we should reconsider Opinion No. 378. . . ."

4570

Thus, the Commission has reiterated its assertion of jurisdiction over Sun's assignment and conveyance of leases involved in this case. For all the reasons set forth in Sun's Application for Rehearing and Stay of Opinion No. 378 and its accompanying order, which is incorporated herein by reference, such assertion of jurisdiction is unlawful because it is beyond the Commission's statutory authority. Sun denies that the Commission has any such jurisdiction.

III.

The Commission, in its order issued April 2, 1963, purportedly provides only the possibility but not the certainty of an "evidentiary hearing" upon notification within 30 days by Sun and others that such an "evidentiary hearing" is desired and thereafter upon the exercise of the Commission's unfettered discretion whether such a hearing will actually be held. The Ordering Paragraphs read as follows:

"(A) The applications for rehearing filed by Texas Eastern, Continental, Sun, Marr and General Crude are hereby granted subject to the procedures discussed above and set forth in paragraph (B) below.

"(B) If Continental, Sun, Marr or General Crude desire a further evidentiary hearing, they shall notify the Commission within 30 days of the issuance of this order setting forth specifically the nature of the evidence which they propose to introduce, and what they intend to prove thereby. The evidence shall be confined to the following issues. (1) Whether the

4571

Commission has jurisdiction over the sale of leases to Texas Eastern, (2) whether the lease sale type of arrangement between the producers and Texas Eastern is in the public interest, and (3) whether the lease-sale arrangement may be rescinded and another arrangement substituted. The evidence shall not include cost data or other data in support of a particular price or rate level, or evidence of other arrangements between the parties."

In the body of its order, the Commission states that:

"* * * Before making further disposition of these proceedings we shall therefore grant rehearing to afford the four producers an opportunity to show whether a proper resolution of this matter requires a further evidentiary hearing. To this effect we shall require that they file within 30 days of this order a further pleading setting forth the nature of the evidence they propose to submit and what they intend to prove by such evidence at any further hearing in this proceeding so that we may determine whether any further evidentiary hearing is necessary. Such evidence should be confined to whether we have jurisdiction over the transaction between the producers and Texas Eastern presently before the Commission, whether the present lease sale type of arrangement is in the public interest and whether it may be rescinded. * * *"

"If it appears that significant new evidence relevant to the issues referred to above will be introduced, we shall set the case for further hearing and simultaneously specify the procedure for further action in the case. * * *"

(4571)

It is apparent, from the very language used in Ordering Paragraph (A), that the action of the Commission was expressly made "subject to the procedure discussed above and set forth in paragraph (B) below." Thus, it is evident,

4572

from both the ordering paragraphs and the statements in the body of the order that the Commission did not in fact grant rehearing, nor did it provide for any hearing in these cases, but merely offered the possibility of a rehearing or hearing subject to the Commission's discretion in the future and to conditions which the Commission could not lawfully impose.

IV.

It is apparent from the Commission's delineation of the "issues" as set forth in Paragraph (B) of the order of April 2, 1963, coupled with its reassertion of jurisdiction in language which we have quoted above, that the "extraordinary hearing" which it states it may afford Sun and others is designed merely to go through the formalities on issues which the Commission has already determined.

The Commission has in fact made additional unsupported findings of fact and conclusions of law as follows:

(1) The Commission has jurisdiction over the sale of leases to Texas Eastern unless Sun and others can make a showing that "significant new evidence" exists which would establish the contrary.

(2) The lease sale type of arrangement between the producers and Texas Eastern is not in the public interest.

4573

unless Sun and others can make a showing that "significant new evidence" exists which would establish the contrary.

(3) The "lease-sale arrangement may be rescinded and another arrangement substituted" unless Sun and others can make a showing that "significant new evidence" exists which would establish the contrary.

Thus, after unlawfully asserting twice, in Opinion No. 378 and accompanying order, and in the instant order issued April 2, 1963, that it has jurisdiction, the Commission defines the first "issue" upon which it may receive evidence to be "(1) Whether the Commission has jurisdiction over the sale of leases to Texas Eastern."

The further "issues" upon which the Commission states that it may receive evidence, namely, "(2) whether the lease-sale type of arrangement between the producers and Texas Eastern is in the public interest, and (3) whether the lease-sale arrangement may be rescinded and another arrangement substituted" not only involve the same element of predetermination set forth above with respect to issue (1), but also obviously require Sun to accept Commission jurisdiction which Sun is unwilling to accept in this case, where the Commission has so patently exceeded its authority under the Natural Gas Act.

4574

Moreover, by providing for a possible "evidentiary hearing" and defining certain "issues" upon which it may receive evidence from Sun and other producers, the Commission has attempted to place upon them and to shift to them a burden of proof which is not authorized by the Natural Gas Act.

WHEREFORE, for all of the foregoing reasons, Sun requests the Commission to grant this application for rehearing of its order issued April 2, 1963, and upon such rehearing to reverse and set it aside, together with Opinion No. 378 and accompanying order upon which the order of

(4574)

April 2, 1963 is based and to grant a stay of said orders pending judicial review thereof.

Respectfully submitted,

SUN OIL COMPANY

By ROBERT E. MAY
Robert E. May
Its Attorney

JOHN A. WARD, III
PHILLIP D. ENDOM
1608 Walnut Street
Philadelphia 3, Pennsylvania

JOINER CARTWRIGHT
HERF M. WEINERT
P. O. Box 2831
Beaumont, Texas

ROBERT E. MAY
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Sun Oil Company

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas

Of Counsel

4575

DISTRICT OF COLUMBIA, SS:

Robert E. May, being first duly sworn, deposes and says that he is attorney for Sun Oil Company; that as such he has signed the foregoing "Application For Rehearing And Stay By Sun Oil Company" for and on behalf of said Company; that he is authorized so to do; that he has read

(4581)

said Application and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

ROBERT E. MAY
Robert E. May

Subscribed and sworn to before me, a Notary Public, this 17th day of April, 1963.

THOMAS C. EVANS
Thomas C. Evans
Notary Public

(SEAL)

My Commission expires September 14, 1965.

4576-4579

CERTIFICATE OF SERVICE

4580

(Docketed April 22, 1963)

BEFORE THE FEDERAL POWER COMMISSION
UNITED STATES OF AMERICA

Docket Nos. G-12446, G-12447 and G-12432

In the Matters of

TEXAS EASTERN TRANSMISSION CORPORATION
CONTINENTAL OIL COMPANY

Application for Rehearing by General Crude Oil Company

4581

Comes now General Crude Oil Company (General Crude) and, pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's

(4581)

Rules of Practice and Procedure, being aggrieved, and hereby applies for rehearing of the Commission's order in the above-entitled proceedings, issued on April 2, 1963. In support of this application for rehearing, General Crude states as follows:

I.

The order issued April 2, 1963 is misleadingly entitled "Order Granting Applications for Rehearing". Contrary to its caption, the order denies General Crude's Application for Rehearing and Stay of Opinion No. 378 and accompanying order by specific language, as follows:

4582

"As indicated by the applications for rehearing our opinion and order made Sun, Marr and General Crude parties to these proceedings and we shall treat them as such. All four of the producers have argued at length the jurisdictional question raised by the record in this proceeding on the legal grounds in their applications for rehearing and nothing in their petitions persuades us that on the basis of the facts presently before us we should reconsider Opinion No. 378. * * *"

Thus, the Commission has reiterated its assertion of jurisdiction over General Crude's assignment and conveyance of leases involved in this case. For all the reasons set forth in General Crude's application for rehearing and stay of Opinion 378 and its accompanying order, which is incorporated herein by reference, such assertion of jurisdiction is unlawful because it is beyond the Commission's statutory authority.

II.

The question of whether the Commission has jurisdiction over the Rayne Field lease sale transaction was de-

cided by the Commission in its first decision in this proceeding (21 F.P.C. 860). The Commission's conclusion there that it did not have jurisdiction over the lease transaction was upheld by the Court of Appeals

4583

(287 F. 2d 143) and the lack of this Commission's jurisdiction over this transaction was forever foreclosed by that Court's mandate. The decision on this issue became the law of the case and was binding thereafter upon the Commission, *National Labor Relations Board v. Brown & Root, Inc.*, (C.A.D.C. 1953), 204 F. 2d 139, 146.

III.

As the Commission's order issued April 2, 1963 recognizes, General Crude did not, in its application for rehearing and stay of the Commission's Opinion No. 378 and accompanying order, request an "evidentiary hearing" in this case, nor is such a request made at this time. Insofar as the Commission's order mentions such an "evidentiary hearing" the order purports to impose an entirely new requirement upon General Crude and the order is therefore subject to this application for rehearing under Section 19(b) of the Natural Gas Act.

IV.

The Commission, in its order issued April 2, 1963, purportedly provides only the possibility but not

4584

the certainty of an "evidentiary hearing" upon notification within 30 days by General Crude and others that such an "evidentiary hearing" is desired and thereafter upon the exercise of the Commission's unfettered discretion whether such a hearing will actually be held. The Ordering Paragraphs read as follows:

“(A) The applications for rehearing filed by Texas Eastern, Continental, Sun, Marr and General Crude are hereby granted subject to the procedures discussed above and set forth in paragraph (B) below.

“(B) If Continental, Sun, Marr or General Crude desires a further evidentiary hearing, they shall notify the Commission within 30 days of the issuance of this order setting forth specifically the nature of the evidence which they propose to introduce, and what they intend to prove thereby. The evidence shall be confined to the following issues: (1) Whether the Commission has jurisdiction over the sale of leases to Texas Eastern, (2) whether the lease sale type of arrangement between the producers and Texas Eastern is in the public interest, and (3) whether the lease-sale arrangement may be rescinded and another arrangement substituted. The evidence shall not include cost data or other data in support of a particular price or rate level, or evidence of other arrangements between the parties.”

In the body of its order, the Commission states that:

“* * * Before making further disposition of these proceedings we shall therefore grant

4585

rehearing to afford the four producers an opportunity to show whether a proper resolution of this matter requires a further evidentiary hearing. To this effect we shall require that they file within 30 days of this order a further pleading setting forth the nature of the evidence they propose to submit and what they intend to prove by such evidence at any further hearing in this proceeding so that we may determine whether any further evidentiary hearing is necessary.

Such evidence should be confined to whether we have jurisdiction over the transaction between the producers and Texas Eastern presently before the Commission, whether the present lease sale type of arrangement is in the public interest and whether it may be rescinded."

"If it appears that significant new evidence relevant to the issues referred to above will be introduced, we shall set the case for further hearing and simultaneously specify the procedure for further action in the case. * * *"

It is apparent, from the very language used in Ordering Paragraph (A), that the action of the Commission was expressly made "subject to the procedure discussed above and set forth in Paragraph (B) below." Thus, it is evident, from both the ordering paragraphs and the statements in the body of the order that the Commission did not in fact grant rehearing, nor did it provide for any hearing in these cases, but merely offered the possibility of a rehearing or hearing subject to the Commission's discretion in the future and to conditions which the Commission could not lawfully impose.

4586

V.

It is apparent from the Commission's delineation of the "issues" as set forth in Paragraph (B) of the order of April 2, 1963, coupled with its reassertion of jurisdiction, in language which we have quoted above, that the "evidentiary hearing" which it states it may afford General Crude and others is but a hollow mockery and is designed merely to go through the formalities on issues which the Commission has already predeetermined.

(4586)

Thus, after unlawfully determining twice, in Opinion No. 378 and accompanying order, and in the instant order issued April 2, 1963, that it has jurisdiction, the Commission defines the first "issue" upon which it may receive evidence to be "(1) Whether the Commission has jurisdiction over the sale of leases to Texas Eastern." And this "issue" has been settled in the same order in which the Commission has reasserted its alleged jurisdiction.

The further "issues" upon which the Commission states that it may receive evidence, namely, "(2) whether the lease-sale type of arrangement between the producers and Texas Eastern is in the public interest, and (3) whether

4587

the lease-sale arrangement may be rescinded and another arrangement substituted" not only involve the same element of predetermination set forth above with respect to issue (1), but also obviously require General Crude to accept Commission jurisdiction which General Crude is unwilling to accept in a case where the Commission has so patently exceeded its authority under the Natural Gas Act.

Moreover, by providing for a possible "evidentiary hearing" and defining certain "issues" upon which it may receive evidence from General Crude and other producers, the Commission has attempted to place upon them and to shift to them a burden of proof which is not authorized by the Natural Gas Act. General Crude is not an applicant for a certificate of public convenience and necessity in this case, because no such certificate is here required, and it has no burden for the presentation of evidence or in any other manner.

VI.

This application for rehearing may be considered as notification by General Crude that no notice as contem-

plated by Paragraph (B) will be submitted by General Crude and as notification by General Crude, pursuant to Ordering

4588

Paragraph (B), that it does not desire an "evidentiary hearing" as described in and under the limitations imposed by the Commission's order, which are obviously not within the Commission's authority under the Act. The only certificate proceeding where General Crude would have any type of burden to offer evidence would be at such time, if ever, when General Crude applied for a certificate and its legal right then would be to offer such evidence as it believed established public convenience and necessity. General Crude also hereby reserves its right to offer evidence at any and all lawful hearings which the Commission might hold involving this transaction.

WHEREFORE, for all of the foregoing reasons, General Crude requests the Commission to grant this application for rehearing of its order issued April 2, 1963, and upon such rehearing to reverse and set it aside, together with Opinion No. 378 and accompanying order upon which the order of April 2, 1963 is based.

Respectfully submitted,

By W. McIVER STREETMAN
W. McIver Streetman

LEON M. PAYNE, *Esq.*

W. McIVER STREETMAN, *Esq.*

Andrews, Kurth, Campbell & Jones

25th Floor Humble Building

Houston 2, Texas

Attorneys for General Crude Oil Company

(4589)

4589

THE STATE OF TEXAS
COUNTY OF HARRIS.

W. McIver Streetman, being first duly sworn, deposes and says that he is attorney for General Crude Oil Company; that as such he has signed the foregoing "Application for Rehearing by General Crude Oil Company" for and on behalf of said Company; that he is authorized so to do; that he has read said Application and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

W. McIVER STREETMAN
W. McIver Streetman

Subscribed and sworn to before me, a Notary Public, this 19th day of April, 1963.

FEROL ROGERS

Ferol Rogers

*Notary Public in and for
Harris County, Texas.*

(SEAL)

My Commission expires June 1, 1963

4590-4594

CERTIFICATE OF SERVICE

4595

(Docketed April 30, 1963)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

TEXAS EASTERN TRANSMISSION CORPORATION

CONTINENTAL OIL COMPANY

Application of Continental Oil Company for Rehearing

Docket
Nos.

G-12446,

G-12447

G-12432

4596

TABLE OF CONTENTS

4597

Comes now Continental Oil Company ("Continental"), and pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, hereby applies for a rehearing of the Commission's "Order Granting Applications for Rehearing" issued herein on April 2, 1963. In support of this application, Continental states as follows:

I.

THE ORDER OF APRIL 2, 1963, REPEATS AND PERPETUATES THE COMMISSION'S BASIC ERRORS FOUND IN ITS OPINION No. 378 AND ORDER OF FEBRUARY 6, 1963

The Commission's Order of April 2, 1963, like its Opinion No. 378 and accompanying Order of February 6, 1963, repeats and perpetuates the following errors:

—It again ignores the property and mineral laws of the State of Louisiana;

(4597)

— It again goes counter to the IRS ruling of January 13, 1959, in violation of the rule of res judicata;

4598

— It adheres to the reversal of Presiding Examiner Frazee's correct Decision of June 29, 1962, on the jurisdictional question;

— It once more repudiates the Commission's own Brief of July 11, 1960, filed in the Court of Appeals;

— It again attempts to overrule the Court of Appeals' Opinion of December 8, 1960, to disobey that appellate court's remand, and to redetermine issues which have been precluded from being reconsidered by the established law of this case;

— It again presumes to overrule the U. S. Supreme Court's 1949 decision in the *Panhandle* case;

— It again proposes to rewrite the Natural Gas Act of 1938 without Congressional sanction;

— It again assumes authority which no court (let alone an administrative agency) possesses, to compel parties to rescind a lawful, binding, and consummated transaction; and

— It again assumes power to direct the parties to agree upon and enter into completely new and different contractual relationships, which direction is impossible to comply with, is a legal nullity, and is beyond the authority of this

4599

Commission or of any other administrative or judicial body.

These basic errors were pointed out and discussed at length in Continental's Application for Rehearing filed on March 7, 1963, and addressed to Opinion No. 378 and the accompanying Order issued on February 6, 1963. That earlier Application is hereby incorporated by reference with the same force and effect as though repeated verbatim in this Application.

II.

ERRORS IN THE ORDER OF APRIL 2, 1963, WITH RESPECT TO THE "JURISDICTIONAL QUESTION"

Despite Continental's painstaking exposition and elucidation of the pertinent facts and law in its earlier Application for Rehearing, the Commission's Order of April 2, 1963, states that:

"All four of the producers have argued at length the jurisdictional question raised by the record in this proceeding on legal grounds in their applications for rehearing and nothing in their petitions persuades us that on the basis of the facts presently before us we should reconsider Opinion No. 378 . . . we shall therefore grant rehearing to afford the four producers an opportunity to show whether a proper resolution of this matter requires a further evidentiary hearing. To this effect, we shall require that they file . . . a further pleading setting forth the nature of the evidence they propose to submit and what they intend to prove by such evidence . . . Such evidence shall be confined to whether we have jurisdiction over the transaction between the producers and Texas Eastern presently before the Commission" (Emphasis added.)

. The Order of April 2, 1963, later directs that:

“(B). If Continental, Sun, Marr and General Crude desire a further evidentiary hearing, they shall notify the Commission setting forth specifically the nature of the evidence which they propose to introduce, and what they intend to prove thereby. The evidence shall be confined to the following issues: (1) *Whether the Commission has jurisdiction over the sale of leases to Texas Eastern*” (Emphasis added.)

The errors committed by the Commission in the above-quoted and related portions of its Order of April 2, 1963, are as follows:

1. The Commission knew full well that all of the evidence upon which Continental relies pertaining to the “jurisdictional question” is already a part of the record in this case, or can be made so by reference or judicial notice, because such evidence was cited, quoted, and discussed in detail in Continental’s earlier Petition for Rehearing. Therefore, the proffered “opportunity” of “a further evidentiary hearing” on the “jurisdictional question” is, on its face, a mere pretense and a sham.

2. The record in this case shows beyond the slightest doubt that Continental et al. sold leasehold interests in real estate and not a single cubic foot of “natural gas.” Accordingly, under the property and mineral laws of Louisiana, under the Natural Gas Act as written by Congress, under the Supreme Court’s decision in *Panhandle*, and under the established law of this very case, no issue

is or can be raised herein as to whether the Commission possesses jurisdiction over the assignors of the Rayne

Field leases. Since Continental et al. did not sell any gas, but sold only interests in "real rights and incorporeal immovable property," the "jurisdictional question" or "jurisdictional issue" has vanished from this case. So held the Commission itself on June 23, 1959, in its Opinion No. 322; so explained the Commission over and over again in its Brief of July 11, 1960, to the Court of Appeals; and so held the Court of Appeals flatly and conclusively in its adjudication of December 8, 1960. The Commission erred, therefore, in referring in its Order of April 2, 1963, to "the jurisdictional question *raised by the record in this proceeding.*" That record raises no such question; on the contrary, that record negatives the existence of any such "issue." By the same token, the Order of April 2, 1963, is in error in stating that there is "presently before the Commission" an "issue" as to "whether we [FPC] have jurisdiction over the transaction between the producers and Texas Eastern." And when this same non-existent "issue" is later restated in the decretal part of the Order, as being, "Whether the Commission has jurisdiction over the *sale of leases* to Texas Eastern," the paradoxical language employed automatically negates the existence of any such "issue."

4602

3. Not only is it clear from this record that Continental et al. sold no gas to Texas Eastern, but there is not one scintilla of evidence in the record that what Continental et al. did sell constituted a "sale in interstate commerce of natural gas for resale for ultimate public consumption." The complete absence of any such evidence likewise eliminates the possibility that any "issue" of jurisdiction over Continental et al. can be "raised by the record in this proceeding" or be "presently before the Commission."

(4602)

4. As we thought we had made clear in Continental's previous Application for Rehearing (pp. 30-31), slapping the false label of "producers" upon Continental et al. is futile. The fact remains that Continental et al. didn't produce a molecule of the Rayne Field gas that went into Texas Eastern's interstate system. Yet the same misleading play on words is repeated four times in a row on page 2 of the April 2nd Order.

5. All of the applications for rehearing addressed to the Commission's Opinion No. 378 and accompanying Order of February 6, 1963, laid stress on the facts and the law which preclude the Commission from asserting jurisdiction over Continental et al. under the doctrine of the law of the case. Continental's Application dealt with this question *in extenso* (pp. 8, 22-26, 37-41, 45-46, 48-54, 57), so there is no need to repeat that full discussion here. It is highly significant,

4603

however, that this vitally important question is not even mentioned in the Commission's Order of April 2, 1963. Indeed, that Order again disregards the established law of the case and again disobeys the Court of Appeals' remand by insisting that the main issue to be determined is "whether we [FPC] have jurisdiction over the transaction between the producers and Texas Eastern," or, as later rephrased: "Whether the Commission has jurisdiction over the sale of leases to Texas Eastern."

6. Continental's earlier Application for Rehearing further demonstrated (pp. 8, 10-11, 14, 46-48, 55-57) that the IRS tax ruling, rendered on January 13, 1959, by a coordinate branch of the Federal Government, is binding upon the Commission as *res judicata*, and hence also precludes FPC from making a subsequent contrary ruling. The IRS found, on the basis of the documents evidencing

the transaction of July 27, 1959, between Continental et al. and Texas Eastern, that such transaction consisted of a sale of "leasehold rights." In its Opinion No. 378 and Order of February 6, 1963, the Commission found, on the basis of the self-same documents, that the transaction consisted of a sale of "natural gas." (Only by so holding could the Commission pretend that the transaction had been "jurisdictional.") The IRS ruling came first, however, and as a matter of law could not later be disregarded or contravened by the

4604

FPC. The Commission's Order of April 2, 1963, is likewise significantly silent on this phase of the case.

III.

ERRORS IN THE ORDER OF APRIL 2, 1963, WITH RESPECT TO "ISSUES" OF "PUBLIC INTEREST," "RESCISSION" AND "NEW ARRANGEMENTS"

The illusory "evidentiary hearing" which the Commission's Order of April 2, 1963, holds out with one hand—and then snatches back with the other—would ostensibly afford Continental et al. an unrequested and patently disadvantageous "opportunity" to adduce evidence on two additional "issues":

"(2) whether the lease sale type of arrangement between the producers and Texas Eastern is in the public interest," and

"(3) whether the lease-sale arrangement may be rescinded and another arrangement substituted."

The errors inherent in this and related portions of the Order of April 2, 1963, are as follows:

(4604)

1. The two additional "issues" are subordinate to, and wholly dependent upon, the jurisdictional "issue." Since the Commission clearly lacks jurisdiction over the sale of leases, there is no reason for introducing further evidence pertaining to other "issues" which assume, contrary to fact and law, that the Commission possesses such jurisdiction.

4605

2. The Court of Appeals' adjudication and remand prohibited any further FPC proceedings which would be inconsistent with the Court's opinion. The judicial remand also limited subsequent FPC proceedings to one of two courses, each of which could involve and affect Texas Eastern only. The April 2nd Order proposes that the "evidentiary hearing" should deal not only with the "jurisdictional question" but with the subordinate "issues" above quoted. The proposal respecting these two additional issues would call for FPC proceedings which are totally inconsistent with the Court of Appeals' opinion and hence in violation of the Court's adjudication and remand.

3. As used by the Commission, the term "in the public interest" is too vague, ambiguous and whimsical to define any "issue." The lease sale transaction was emphatically found by the Commission in its Opinion No. 322, issued June 23, 1959, to be "in the public interest." Based on the identical record, the same transaction was found by the Commission on February 6, 1963 to be "not in the public interest." The Order of April 2, 1963, is predicated on a finding that it is "in the public interest" to offer Continental et al. a phoney "evidentiary hearing" on "issues" which have already either been finally decided by the Court of Appeals or have been prohibited by that Court from being considered by the Commission.

4606

In short, the record here shows that what is "in the public interest" means, when FPC employs that phrase, anything that the Commission desires to accomplish at the moment. Under these circumstances, the invitation to Continental to state what evidence it would like to introduce to satisfy the Commission's present notion of what is "in the public interest" is perfectly idle—particularly when the Commission declares in the same breath that Opinion No. 378 represents its final pronouncement on the subject of "public interest" in this case.

4. Whether the FPC has authority to force Continental et al. to agree to rescind their four-year-old leasehold conveyance and to agree to substitute some new "arrangement," presents purely a question of law. No "evidentiary hearing" on that issue is required. Everything we wish to say on this subject has already been said at pages 8, 9 and 79 through 86 of our earlier Application for Rehearing.

IV.

THE ORDER OF APRIL 2, 1963, GRANTED NO REHEARING OR OTHER RELIEF REQUESTED BY THE PARTIES. IT WAS SIMPLY A FACE-SAVING DEVICE AND POSSIBLY A TRAP

Continental's earlier Application for Rehearing showed conclusively (pp. 8 and 58 through 78) that the Commission had deprived Continental et al. of due process of law in flagrant violation of the Fifth Amendment to the Constitution of the United States. The Order of April 2,

4607

1963, was obviously not designed to grant a rehearing or any of the other relief Continental has requested, but primarily to extricate the Commission, if possible, from

(4607)

the consequences of its reckless disregard of constitutional rights.

The April 2nd Order makes it abundantly clear that this Commission has no intention of again changing its mind:

"We think there is no merit to the contentions that the jurisdictional question was not in issue in the remanded proceedings . . ."

"All four of the producers have argued at length the jurisdictional question raised by the record in this proceeding on legal grounds in their applications for rehearing and nothing in their petitions persuades us that on the basis of the facts presently before us we should reconsider Opinion No. 378."

All of the facts we rely upon pertaining to the "jurisdictional question" were cited and discussed at length in Continental's 88-page Application for Rehearing addressed to Opinion No. 378. We there expressed no "desire" for "a hearing to supplement the record." (The statement in the Order of April 2nd that we "indicated" such a "desire" is mistaken.) The fact that we had no "desire" to put in more evidence should have been clear from the fact that, as the Order observes, we failed to indicate "in what respect the record is incomplete." Moreover, the prayer for relief at the end of Continental's petition (pp. 87-88) contained nothing even resembling a request for a further "evidentiary hearing." Yet, that is the very "relief" which this curious

4608

Order grants:

"Before making further disposition of these proceedings we shall therefore grant rehearing to afford the four producers an opportunity to show whether a

proper resolution of this matter requires a further evidentiary hearing."

Why should the Order of April 2, 1963, grant this unrequested, unnecessary and unprecedented form of "rehearing"? A study of the Order indicates that the objectives back of it were, first and foremost, to attempt to save face, and, perhaps secondly, to attempt to entrap Continental et al.

A. *The Face-Saving Objective of the Order.*

The face-saving effort starts with an argument that the Commission's utter disregard for constitutional rights can be explained away and should be condoned. Without any factual basis or justification, the Order avers that Continental "was or should have been aware that its role of being only 'nominally a party' in the case was being seriously challenged by the Staff." Then, the Order speculates that Sun, Marr and General Crude "probably also had actual knowledge that the status of their sales to Texas Eastern was being raised before the Commission." The short answer to such unsupported excuses and guesses appears at page 73 of Continental's prior Application for Rehearing:

"Certainly, Continental (or any of the other Assignors who, perchance, saw it) was entitled to rely on the Commission's Order of July 14th. With equal certitude, Continental et al. were fully justified in relying on

4609

the Commission to honor the judicially established law of the case and to obey faithfully the Court of Appeals' remand."

Next, the Order of April 2nd expresses feigned "doubt that any of the producers were deprived of due process." This self-serving pronouncement is belied by the very fact that the Commission deemed it expedient to issue the senseless Order of April 2nd.

Next, the Commission's predicament is characterized as being "a matter of first impression," which means, apparently, that this is the first time this Commission has been caught flat-footed in the forbidden pantry with its hand in the Due Process cookie jar and its face smeared with Unconstitutional jam.

The job of attempted face-saving is finally wound up with sanctimonious dispensation:

"In the special circumstances of this case we believe we should take extra precautions to assure that the producers have a full opportunity to present their case."

The "extra precautions," specified later in the Order, turn out to be so precautions that the proffered "opportunity" is completely empty, instead of "full." Continental et al. are called upon to show in advance whether they have any additional "significant" evidence and to reveal what they expect to prove thereby. Such evidence, if any, must pertain to selected "issues" which the Commission is

4610

foreclosed from trying, considering or deciding by the judicially established law of the case. Then, after proclaiming that the "producers'" prior petitions have failed to "persuade" the Commission to reconsider Opinion No. 378, the Order provides that:

"If it appears that significant new evidence relevant to the issues referred to above will be introduced, we shall set the case for further hearing . . ."

In other words, the Commission has no intention whatever of granting the proffered "evidentiary hearing"—that is why these elaborate "extra precautions" were taken!

The unconstitutionality of Opinion No. 378 and the accompanying Order of February 6, 1963, did not arise out of mere failure to permit Continental et al. to introduce a few bits of additional evidence: it was caused by giving notice (the Order of July 14, 1961) that the reopened proceedings would be conducted in strict compliance with the Court of Appeals' adjudication; by so framing the issues that Texas Eastern alone had the burden and Continental et al. had no reason or right to participate in any of the post-remand proceedings or arguments; and then by saddling Texas Eastern's burden upon Continental et al. when they were absent, unrepresented and defenseless, in violation of every procedural and substantive statute, rule of common law, and principle of equity applicable to this case.

4611

The unconstitutional taint afflicting Opinion and Order No. 378 cannot now be cured by self-serving excuses or any variety of palliatives such as belated "extra precautions" and hollow "full opportunities." *If* Continental et al. had been actual parties in interest in the reopened proceedings, and *if* the jurisdictional issue had been open for redetermination therein, and *if* Continental et al. had taken active parts throughout, who can say now what decision the Commission would have rendered instead of Opinion No. 378? What other evidence, if any, would Continental et al. have adduced? What would have been brought out through Continental's, Sun's, Marr's, and General Crude's cross examinations of witnesses? What persuasive arguments would Continental et al. have advanced in their briefs and upon oral argument? At this

(4611)

juncture, it is much too late to turn back the clock, reconstruct the past, and find correct answers to these questions.

The Commission decided this case in what was, so far as Continental et al. are concerned, an *ex parte* proceeding. As a consequence, the Commission arrived at a completely illogical, unfair and unlawful result. To make matters worse, the Commission has now proclaimed its adamant determination to stick by that result, no matter how erroneous it has been shown to be in our previous Application for Rehearing. No gesture in the direction of "extra

4612

precautions," nor any bestowal of "full opportunities," nor any labeling of an order which effectively denies rehearing as an "Order Granting Applications for Rehearing," can undo the injustice, the illegality or the unconstitutionality of Opinion No. 378 and its accompanying Order of February 6, 1963.

B. *The Entrapment Feature of the Order*

If Continental et al. were to accept the April 2nd Order's invitation to disclose "significant new evidence," explain its probative effect, and thereby persuade the Commission to reopen the record, Continental et al. could be slaughtered like sitting ducks.

Continental has consistently maintained that the jurisdictional "issue" is entirely out of this case and cannot be reconsidered or redetermined by the Commission in view of (a) the Supreme Court's *Panhandle* decision, (b) the Court of Appeals' adjudication of the law of this case, (c) the explicit procedural limitations prescribed by the Court of Appeals' opinion and remand, and (d) the IRS ruling of January 13, 1959. The April 2nd Order's invitation to seek an "evidentiary hearing" on the "jurisdictional question" constitutes an invitation to Continental

et al. to concede that the FPC's erroneous and illegal assertion of jurisdiction is, indeed, an "issue" which can now properly and lawfully be reconsidered and redetermined by the Commission

4613

Acceptance of that invitation would necessarily mean a waiver and abandonment by Continental of its entire position and all of its objections to any trial, consideration or determination of the "jurisdictional question."

Furthermore, if Continental were to seek the proffered "evidentiary hearing," and if the proceedings should be reopened, that would permit the Staff and Intervenors to mess up the present clean record and enable them then to argue that the messed-up record is sufficiently different from the clean one reviewed by the Court of Appeals to make inapplicable here the doctrine of the law of the case.

Continental has no intention of being caught in such a trap. The April 2nd Order's invitation to seek a further "evidentiary hearing" is, therefore, in all respects declined.

V.

THE APPENDICES HERETO

To eliminate any contention that the documents listed below are not technically a part of the record in this proceeding, or that they have not been formally incorporated in such record by reference, or that they may not be judicially noticed, true and complete copies of such documents are appended hereto and are hereby made a part of this Application for Rehearing:

1. The IRS tax ruling dated January 13, 1959.

4614

2. The Commission's Brief, dated July 11, 1960, filed with the United States Court of Appeals for the Dis-

(4614)

trict of Columbia in case No. 15,412, entitled *Public Service Commission of the State of New York, Petitioner, v. Federal Power Commission, Respondent*.

3. The Judgment, dated December 8, 1960, of said Court of Appeals in said case No. 15,412, as filed with and docketed by the Commission in March 6, 1961, together with the opinion of said Court of Appeals in said case, being the same opinion which is reported in 287 F. 2d 143.

CONCLUSION

In addition to the requests contained in the Conclusion of Continental's previous Application for Rehearing, appearing at pages 87 and 88 thereof, Continental requests that the Commission grant rehearing of its Order Granting Applications for Rehearing issued April 2, 1963, and that said Order likewise be withdrawn and vacated.

Respectfully submitted,

LLOYD F. THANHOUSER

BRUCE R. MERRILL

THOMAS H. BURTON

JOHN M. BERLINGER

Attorneys for

Continental Oil Company

By LLOYD F. THANHOUSER

Lloyd F. Thanouser

Dated at Houston, Texas
this 29th day of April, 1963

4615

AFFIDAVIT

Before me, the undersigned authority, on this day personally appeared Lloyd F. Thanhouser, who, being by me duly sworn, on oath deposes and says: That he is Vice President and General Counsel of Continental Oil Company; that he has prepared and read the foregoing Application of Continental Oil Company for Rehearing, and that the facts stated therein are true to the best of his knowledge, information, and belief.

LLOYD F. THANHOUSER
Lloyd F. Thanhouser

Sworn to and subscribed before me, this 29th day of April, 1963.

HALLIE P. MADELEY
*Notary Public in and for
Harris County, Texas*

(SEAL)

4616-4620

CERTIFICATE OF SERVICE

(4621)

4621

Appendix 1

U. S. TREASURY DEPARTMENT
WASHINGTON 25

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

—
ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON 25, D. C.

AND REFER TO

T:R

T:S:EN-JFH

January 13, 1959

Mr. Charles R. Bell

Director, Tax Division—Financial Department
Continental Oil Company
P. O. Box 2197
Houston 1, Texas

In re: Request for a ruling,
Continental Oil Company et al., Grantors

Dear Mr. Bell:

This is in reply to your letter of October 31, 1958, in which you request the Commissioner of Internal Revenue to rule on the tax consequences of a proposed transaction between Continental Oil Company (Conoco), (Sun Oil Company (Sun), General Crude Oil Company (General), and Mr. M. H. Marr, husband of Adah Kleinsmid (Marr), collectively called Grantors, and the Louisiana Gas Corporation (Grantee). The pertinent facts as presented in

your letters and the accompanying instruments, together with statements made at conferences, are summarized as follows:

Grantors collectively control 96% of the operating interests in developed and producing oil, gas, and mineral leases of certain portions of the Rayne Field, Acadia Parish, Louisiana, on which there are currently 18 gas wells, producing from the reservoirs above the base of the Nodosaria "A" sands. The gas in these reservoirs, estimated to contain 783,499,000,000 cubic feet of gas, contains substantial quantities of liquid hydrocarbons which can be removed, after severance, by mechanical and other separation methods.

The Grantors propose, individually and severally, to sell to Grantee, and Grantee proposes to buy from Grantors, all of their operating interests in oil, gas, and minerals situated within the limits of the leases, together with all of Grantors' interests in gas wells and related lease and well equipment, gathering and flow lines,

4622

tanks, separators, and other equipment and personal property located in the wells and on the leaseholds, with certain reservations as explained below. The draft of "Assignment and Conveyance" contains the following provisions.

The Grantors will retain and reserve unto themselves:

I. *Leasehold Rights.*

Deep Rights: All leasehold rights below the base of the Nodosaria "A" Sand.

Oil and other minerals, except gas and condensates, which are found or produced from the properties.

II. *Production Payment*—A production payment will be owned by, and payable directly to, each of the Grantors.

(4622)

in the following proportions:—Continental Oil Company 55.930697%—Sun Oil Company 31.669095%—M. H. Marr 8.404469%—General Crude Oil Company 3.995739%, and is applicable to new leases on the mineral interests covered which may be acquired by Grantee or its successors during the term of the production payment. The production payment will be payable monthly out of condensates and is controlled by the following outlined provisions.

A. Condensate—

(1) Separator Liquids. After Grantee has recovered from the proceeds received by Grantee from the sale of the separator liquid attributable to the net interest in production Grantee's cost of producing and operating the leasehold rights and facilities, Grantors shall be paid 100% of the remaining proceeds received by Grantee from the sale of all separator liquids.

The maximum amount to be received by Grantee under the operating agreements as described in the exhibits from the proceeds of the sale of the separator liquids shall be the actual cost incurred by Grantee, without interest, for its services and labor, plus a fixed sum of \$4,000 per month.

Each Grantor reserves the right to a yearly audit of the books and accounts relative to the operation of the leasehold. The cost of producing and operating shall include, but is not limited to expenditures in connection with the reworking, recompletion, plugging back and abandonment of wells, maintenance and operation of wells and lease and well equipment, field gathering lines and separation facilities, and costs and services and equipment purchased relating to all of the

4623

foregoing, but shall not include the cost of drilling and equipping through the Christmas tree, (or plugging and

abandoning as a dry hole) of any well which may be commercial hereafter, or the cost of deepening any existing well below the present casing.

(2) Natural Gas Liquids. Grantee will construct and operate after the delivery of the "Assignment of Conveyance" a gas processing plant to extract natural gas liquid. The proceeds from the sale of such natural gas liquid shall be made in the same manner as provided in determining net interest in production from separator liquid except for a production payment in existence prior to the execution of the "Assignment of Conveyance".

B. Limitations on Production Payment:

The production payment attributable to the net interest in production covered by this instrument shall continue in effect until the gas production saved and taken by Grantee equals 613,406,770,000 cubic feet of gas, measured after condensate is removed, or until the economically recoverable gas reserves in the assigned and conveyed leasehold rights equal 30 billion cubic feet of gas, whichever occurs first, whereupon said production payment shall cease and terminate.

The consideration for the sale and purchase is \$134,395,700 payable \$12,420,500 cash and \$121,975,200 represented by notes. It is agreed that the consideration for the sale is to be paid to and received by the respective sellers in the following percentages and amounts:

	Percentages	Total Amount	Payable In	
			Cash	Notes
Conoco	55.930697	\$ 75,168,451.75	\$ 6,946,931.75	\$ 68,221,520
Sun	31.669095	42,561,901.91	3,933,373.91	38,628,528
Marr	8.404469	11,295,244.94	1,043,852.94	10,251,392
General	3.995739	5,370,101.40	496,341.40	4,873,760
	100.000000	\$134,395,700.00	\$12,420,500.00	\$121,975,200

(4623)

The promissory notes will be secured by a first mortgage on the assigned leaseholds, and will be payable in monthly installments without interest from the date to maturity, all as more fully set out in the draft of Promissory Note and the draft of Act of Mortgage.

Conoco, in the capacity of independent contractor, will operate the properties to be assigned to Grantee, and for such services, Grantee shall pay Conoco a sum equal to all costs and expenses incurred by Conoco in connection with the performance of its obligations under the terms of a Management agreement, plus a management fee of \$4,000 per month.

4624

If any well drilled by the Continental Oil Company and the other present owners is a gas well, as classified by the State Conservation Commissioner, the Louisiana Gas Company will have an option to purchase such well, while if the Louisiana Gas Company drills a well which proves to be an oil well, as classified by the State Conservation Commission, Continental and the other lessees will have the option to purchase that well. Any oil recovered from a gas well which becomes to any extent an oil well is to be considered as separator liquid and as such will be included in the retained production payment.

The leasehold rights to be sold to Grantee were acquired by the respective Grantors in the usual course of business and with the expectation that the oil, gas and mineral deposits discovered thereon would be exploited and sold as produced. All of such rights owned by the respective Grantors have been held for more than six months.

You have asked that a ruling be issued holding that the gain from the proposed sale shall be recognized under the provisions of section 1231 of the Internal Revenue Code of 1954.

(4624)

Based on the foregoing, it is held that the gain on the sale of the properties being disposed of will be subject to the tax treatment provided by section 1231 to the extent that such properties qualify for such treatment. The bases of the properties involved, the period of ownership, and the status of the taxpayer as a non-dealer in such properties are questions of fact determinable by the District Director, or his representative, of the district in which Federal income tax return of the taxpayer is filed.

It is important that a copy of this letter be attached to the return of the taxpayer for the year in which the proposed transaction is consummated. Accordingly, a copy is attached for that purpose.

Very truly yours,

HAROLD T. SWARTZ

Assistant Commissioner

Enclosures: (2)

cc: OLF, GW, TWS (34)

(4625)

4625

Appendix 2

BRIEF FOR RESPONDENT FEDERAL POWER
COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,412

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, *Respondent.*

ON PETITION TO REVIEW ORDER OF THE
FEDERAL POWER COMMISSION

4626

QUESTIONS PRESENTED

An interstate natural-gas pipeline company sought to expand its transportation and sale facilities. In order to meet consumer need for a greater gas supply it planned itself to produce from certain previously-unoperated leases. It planned to acquire the leases from several assignors without Federal Power Commission approval, as it was free to do. It applied, however, for certificate authority to construct transmission facilities, and to transport through its pipeline, deliver, and sell the gas it would produce from the leaseholds. The Commission issued the certi-

icate applied for. In respondent's opinion the questions are:

1. Whether the Commission, having taken into account the pipeline company's leasehold acquisition costs, abused its discretion in determining that "public convenience and necessity" required the expansion of jurisdictional activities.

2. Whether the Commission abused its discretion by refusing to insist that the pipeline company develop on the record, not only its own costs, but the assignors' costs as well.

4627-4628

INDEX

4629

COUNTERSTATEMENT OF THE CASE

This petition seeks review of a Federal Power Commission order which authorizes expanded deliveries and sales of natural gas by Texas Eastern Transmission Corporation to several utilities along its system—the gas to be produced by Texas Eastern itself from leaseholds it would buy in Acadia Parish, Louisiana. Petitioner, Public Service Commission of the State of New York (PSC),¹ objects

4630

neither to the increased sales nor the transportation facilities which the Commission authorized. The Commission's order does not authorize the purchase of the leases—undisputedly such authorization is outside its jurisdiction (*infra*, p. 17). But petitioner complains that by authorizing the transportation and sale of gas which Texas

¹ PSC was a party to the certificate proceeding before the Commission.

(4630)

Eastern will produce from the leaseholds, the Commission has given a "blessing"² to the price Texas Eastern proposes to pay for the leaseholds in that non-jurisdictional transaction. Petitioner would "damn" the price, not "bless" it; and for such apostolic error it asks the Court to declare the Commission's order unlawful.

1. Texas Eastern's Application

Texas Eastern owns and operates an interstate gas pipeline system extending from Mexico to New York;³ it is a "natural-gas company" within the meaning of the Act;⁴ Texas Eastern applied to the Commission for a certificate authorizing the construction of pipeline facilities and the delivery and sale of natural gas.⁵ In order to show the adequacy of its gas supply to justify the construction, Texas Eastern spread before the Commission its plan of acquiring and operating certain leaseholds in Rayne field, Louisiana.

² The word "blessing" in petitioner's brief is used three times to characterize the effect of the Commission's certification of transportation on the prices paid for the leaseholds (Pet. Br. 11, 24).

³ A system map appears at R. 2283. Texas Eastern's diversified interests include oil and gas production, petroleum products pipelining, and oil refining.

⁴ Natural Gas Act, Act of June 21, 1938, c. 356, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w.

⁵ Texas Eastern's applications were in F.P.C. Docket Nos. G-12446 and G-12447. The latter docket represents the separate application of a former affiliate, Texas Eastern Penn-Jersey Transmission Corporation. The two companies merged during the course of the administrative proceedings.

4631

Texas Eastern planned to buy the leases from the four companies⁶ (hereinafter referred to as "assignors"⁷) which were the original grantees from the landowners. Texas Eastern also planned to acquire certain minority interests in Rayne field.

PSC's complaint centers about the sale of leases. It does not concern a purchase of gas in place within the underground reservoir (which Louisiana mineral law does not recognize). Nor does it involve a contract to sell gas as produced by the assignors. It is true that initially the four assignors planned to produce and operate the field themselves. They contracted to sell to Texas Eastern and applied for certificates of convenience and necessity. Prior to Commission action, however, they terminated the contracts and Texas Eastern negotiated a lease transfer arrangement instead. So far as we can discern, the original program (PSC's "Phase I," Br. 3-7) has little bearing on the issues before this Court.

Neither Texas Eastern nor the assignors applied for certificates permitting transfer of the leases. PSC has never contended that the Act requires such certificates or empowers the Commission to issue them.⁸ Nevertheless it bases its controversy on the acquisition costs.

⁶ Continental Oil Company, M. H. Marr, Sun Oil Company, and General Crude Oil Company.

⁷ We use "assignors" for the sake of clarity. PSC refers to the companies as "producers" and it is true that they are elsewhere engaged in production. In terms of their overall company operations the assignors are "independent producers" (as well as "natural-gas companies" within the meaning of the Act). As regards Rayne field they might fairly be characterized the "developers"; but they will not produce the gas whose cost is the bone of contention in this case.

⁸ We discuss the want of Commission jurisdiction over the transfer of leases at p. 17 *infra*.

(4631)

Texas Eastern's project depended on acquiring gas in Rayne field in order to meet consumer need for 101,660

4632

Mcf⁹ per day of additional gas. The Commission's findings as to such need, and other "conventional" certificating factors such as facilities and financing, are based upon an extensive showing at the hearings and are non-controversial. The only dispute relates to the Commission's discussion of "Gas supply and acquisition of Rayne Field reserves" (R: 3716, 21 FPC 863). The evidence introduced by Texas Eastern was uncontroverted.

2. THE EVIDENCE

a. *The Rayne field reserves*

Rayne field includes several tested gas-bearing strata. An independent geologist estimated the proven saleable reserves in all of Rayne field, as of January 1, 1959, to be 1,021,221 MMcf¹⁰ of which Texas Eastern planned to acquire 988,771 MMcf (R. 1346, 2610).¹¹ The geological estimate of recoverable reserves is conservative; it rests exclusively

⁹ "Mcf" is the standard abbreviation for one thousand cubic feet. All gas volumes in this brief are stated at the standard temperature measurement base of 60° Fahrenheit and at a pressure base of 14.73 psia (pounds per square inch, absolute). When it comes to deriving a unit cost per Mcf for the Rayne field reserves, however, the record suffers a discrepancy in that some components of that cost were calculated at 14.73 psia (e.g., R. 1355 as compared with R. 1464-7, 1704) and others at 15.025 psia (e.g., all references to Louisiana severance tax). Mathematical precision would require an adjustment of 2% in some of the components and a lesser percentage in the total cost per Mcf. But since none of the parties troubled to call the discrepancy to the Commission's attention we shall follow PSC's lead in ignoring it.

¹⁰ Million cubic feet. Rayne field is an unusually large gas reserve (R. 746-7).

¹¹ The difference between these figures represents gas, to be produced from a discrete formation, which has been dedicated to another pipeline company.

upon proven gas-bearing sands (R. 1450) and excludes other unproven sands which may well contain substantial further volumes (R. 1454-5); it assumes abandonment of operations when reservoir pressure drops to 515 pounds, which would leave some 91,220 MMcf of the presently proven reserves unrecovered (R. 1455, 1467). The 988,771 MMcf thus estimated represents the reserves underlying the acquisitions which PSC questions.

4633

The acquisitions encompass two different categories of acreage. Some 95% of the surface, and of the reserves,¹² constituted the "majority interest". This, in turn, was divided into a "working interest" held by the four assignors under some 150 leases (R. 2640-2699) and a "royalty interest" retained by their lessors. Some 5% of the surface, the "minority interest," was held by other lessees. Texas Eastern had secured the majority working interest, comprising some 79% of all interests in the relevant acreage, by a complicated transaction which we outline below. It had not yet completed negotiations with the owners of royalty and minority interests, which together involve some 21% of all interests in the acreage. The Commission accepted Texas Eastern's unchallenged forecast that it would shortly secure the royalty and minority shares.

The assignors had developed the leases in the sense that they had drilled and successfully completed 18 wells (R. 1439, 1626). These wells could amply produce the necessary gas without further drilling (R. 1463). So far as the record shows, however, the assignors had made no sales of gas and, in that sense, had not operated their leaseholds.

¹² Rayne field is largely unitized so that surface acreage determines the proportionate share which a given producer may withdraw (R. 1449). Under Louisiana law, however, no landowner has title to underground reserves in place (R. 1412).

(4633)

b. "Form" of the lease sale transaction

Texas Eastern arranged to acquire the leaseholds through an intermediary company, Louisiana Gas Corporation.¹³ The four assignors entered into a contract with Louisiana Gas (the "Lease Sale Agreement", R. 2618-2624) under which the assignors agreed to sell and Louisi-

4634

ana Gas to purchase the leases, gas wells and appurtenant equipment.¹⁴ By that contract, the assignors undertook to transfer to Louisiana Gas certain interests in the leases by and in accordance with an instrument of "Assignment and Conveyance" (R. 2625-2639). The assignors would wholly alienate their rights to produce natural gas; they would reserve the leasehold rights to any minerals other than gas and a "production payment" interest in condensate liquids extracted from the gas. See, *infra*, p. 7. The agreed sale price was \$134,395,700, payable \$12,420,500 in cash and \$121,975,200 (R. 2619) in sixteen non-interest bearing notes (R. 2777). The notes would fall due on sixteen consecutive years and be payable by Louisiana Gas in equal monthly installments. Upon acquiring the lease interests under the "Assignment and Conveyance", Louisiana Gas would make the cash payment, execute the

¹³ Louisiana Gas was created to serve as an intermediary. Its assets are nominal. It is not an affiliate of Texas Eastern's. (Louisiana Gas' stockholders, officers and directors are members of a law firm which represents Texas Eastern.) There was evidence that the device of transferring oil and gas leases through an intermediary corporation is not peculiar to the instant acquisition (R. 1636-1638).

¹⁴ The agreement was conditioned upon: (1) approval of assignors' title to the leases by Louisiana Gas' attorneys, (2) a ruling by the Internal Revenue Service that assignors' gains from the sale of leases were entitled to long-term capital gains treatment, (3) the Commission's certifying construction of facilities for transporting the Rayne field gas to market, and (4) withdrawal of the assignors' earlier applications for certificate authority to sell gas produced by them from the leases. All of these conditions have been met.

notes and secure payment of the notes by executing an "Act of Mortgage and Pledge" (R. 2771-2776) covering the lease interests (R. 2621).

Thereupon, and in accordance with a "Lease Purchase Agreement" between Louisiana Gas and Texas Eastern (R. 2613-2616), the former would assign its newly-acquired interest in the leaseholds to Texas Eastern for \$12,420,500 in cash (payable on the day of the closing between the assignors and Louisiana Gas). Texas Eastern would acquire the leases, wells and related equipment, subject to the "Acts of Mortgage and Pledge," under a "Conveyance" from Louisiana Gas (R. 2704-2706).

Texas Eastern would not assume any corporate liability on the sixteen non-interest bearing notes (totalling \$121,975,200). Foreclosure of the mortgage would be the assignors' only recourse in case of default. Texas Eastern

4635

would, of course, normally provide Louisiana Gas with funds to meet these notes so as to protect the leases from foreclosure. But should some disaster, such as "cratering",¹⁵ destroy the reservoir Texas Eastern would be free to surrender the leases without incurring liability on any of the outstanding notes (R. 1723).

Thus for \$134,395,700 Texas Eastern would acquire the leases covering majority interest acreage and, consequently, the working interest in any gas it produced from them. In other words, it would have full title to such gas subject only to the royalty interest of the original landowner (i.e., the assignors' grantor, R. 1427-1429), which interest it planned also to acquire (see, *infra*, pp. 8-9). In addition to the natural gas, Texas Eastern would acquire the liquid

¹⁵ Cratering is a collapse of the formation overlying the reservoir which may permit an unchecked escape and loss of gas. Texas Eastern's policy witness described it as a relatively rare phenomenon (R. 1724-1725).

condensate removed from the gas subject to a "production payment" reserved by the assignors.

The production payment, in essence, makes Texas Eastern the assignors' agent as to the liquid condensate.¹⁶ (Condensate includes such hydrocarbons as gasoline, propane and butane.¹⁷) The assignors reserved the proceeds from the sale of condensate with two significant limitations. First, Texas Eastern could recover the direct expenses of operating Rayne field (plus a fixed amount for estimated overheads) out of the condensate revenues. Texas Eastern's vice-president in charge of gas supply explained that the company expected these proceeds from sale of condensate would fully cover all operating expenses. (R. 1633-1634). Second, the production payment to the assignors would terminate altogether prior to the exhaustion of all economically recoverable reserves in the reservoir. Thus, toward the

4636

end of the life of the field, Texas Eastern would probably have added revenues from the sale of condensate (R. 1725).

c. Cost of Rayne field reserves to Texas Eastern

Texas Eastern presented its proposed accounting treatment of the costs of acquiring the majority working interest. It proposed to capitalize the \$12,420,500 down payment. Upon actual withdrawal of each Mef from the reservoir, Texas Eastern will amortize on a unit depletion basis. It intended to expense the \$121,975,200 covered by the promissory notes, charging each payment to an "other deferred debits" account as paid. Again, Texas Eastern

¹⁶ The nature, history, and function of the "production payment" device is explained at R. 1627-8, 1632-3.

¹⁷ Such extracted products are generally assumed not to be "natural gas" within the meaning of the Act.

will credit that account, on a unit depletion basis, as each Mcf is withdrawn.

A unit direct cost of 17.15 cents per Mcf for the majority working interest can be arithmetically derived.¹⁸ While 17.15 cents per Mcf represents the total unit gas revenue to the assignors, two additional factors could enter into Texas Eastern's total cost of service. First, Texas Eastern expected to earn a return on the capitalized \$12,420,500 (adjusted for amortized depletion) and to pay federal income taxes on such return. Second, Texas Eastern, as producer of the gas, would have to pay the Louisiana severance tax. Texas Eastern computed the return and federal tax as 2.3 cents per Mcf, assuming a 6 $\frac{3}{4}$ % rate of return,¹⁹ which brings the cost up to 19.45 cents per Mcf. The Louisiana severance tax has been 2.3 cents, per Mcf, at all relevant times.

Texas Eastern was in the process of negotiating an agreement with the royalty and minority interest owners (R. 1361). While the terms could not be certain, Texas Eastern hoped to pay no more than the 17.15 cents per Mcf which the (majority) assignors would receive (R. 1358, 1360-1361). Nonetheless, in order to present a conservative

4637

picture, Texas Eastern's evidence instead assumed a maximum cost of 22.6 cents per Mcf, exclusive of Louisiana severance tax (R. 1358, 1360-1361). When this figure is averaged in, the derived unit cost of all gas to be acquired in Rayne field is 20.59 cents per Mcf. Adding Louisiana

¹⁸ By dividing 733,498,800 Mcf (the majority working interest proportion of the estimated reserve of 988,771,000 Mcf) into \$134,395,700.

¹⁹ Texas Eastern is requesting that rate of return in a pending rate case, in F.P.C. Docket No. G-12706. The Commission has not approved 6 $\frac{3}{4}$ %.

severance tax²⁰ produces a total unit cost to Texas Eastern of 22.89 cents per Mcf.

Such estimated unit costs are tentative and subject to the following possible infirmities: If, as predicted, there turns out to be more gas in the dedicated acreage than the tests had proven by January 1, 1959, then the cost per Mcf will be lower. If the minority and royalty interests are acquired for less than the 22.6 cents per Mcf maximum, then unit costs will be lower. If the Commission refuses to authorize a 6¾% rate of return for Texas Eastern then the return, and consequently the cost per Mcf will be lower. Finally, the derived unit costs of gas gives no weight at all to potential profits from sale of condensate toward the end of the life of the field.

The record does not go behind the acquisition costs to Texas Eastern. It does not explore the original costs to the assignors of securing or developing these leases or of exploring for gas elsewhere. PSC did not request the issuance of subpoenas compelling the assignors to disclose such data.

d. Advantages of purchasing the Rayne field leases

Whatever the precise unit cost turns out to be, the form of the acquisition offers several distinct advantages to Texas Eastern, the consumers served by its system, and to segments of the public not directly involved herein (R. 1356-1358, 1622-1623, 1625-1626, 1632-1636). Contracts to sell natural gas usually contain escalation provisions of one sort or another and thus pose the prospect of increasing and uncertain gas prices over the life of the contract. The acquisition of leases, coupled

²⁰ Assuming Texas Eastern pays all such tax. The royalty interest owners may have to pay a portion, depending on the exact arrangement negotiated with them.

with the provision for deducting amounts covering the annual expenses of operating Rayne field from the production payment, assured Texas Eastern of a fixed cost. Contracts to sell gas today oblige the purchaser to take a minimum volume when offered or pay for it as if taken. Increasingly high minima cause an inflexibility in a pipeline company's gas supply which acquisition of leases avoids. Being its own producer, Texas Eastern will be in a position to regulate its takes in terms of the seasonal and cyclical needs of its system. (Cf. R. 1732, 1772.) Moreover, while gas purchases could activate "favored-nations" and other indeterminate pricing clauses in prior contracts, the purchase of leases cannot have such effect on either Texas Eastern's or other pipeline companies' outstanding contracts.

The advantages of securing at least part of its gas supply in the form of developed leases had led Texas Eastern to suggest such a transaction to the assignors (R. 1716). Initially they had preferred themselves to produce the leaseholds and to sell such production under contract. Even though Texas Eastern wanted to buy the leases, it was willing to enter into such contracts because of its growing need for new supplies.

Texas Eastern's witness²¹ explained why he had recommended purchase of Rayne field gas (R. 113-125, 134, 142, 159). In seeking to meet the request and estimated future needs of Texas Eastern's customers he was limited to seeking reserves relatively near to the existing pipeline system. The commitment of available reserves in some areas, plus intense competition of other purchasers along the remainder of the system, made it imperative in his

²¹ He had been vice-president in charge of gas supply at the time of his recommendation.

mind to seize the opportunity of contracting for the large volume of Rayne field gas.²² Texas Eastern had suffered

4639

several reverses in this competition for new gas; the witness particularly emphasized the number of intrastate and other nonregulated companies buying successfully in the field.²³ Given the proximity of Rayne field to Texas Eastern's system²⁴ and the magnitude of gas available, it seemed an extremely desirable source of supply.

Finally, there was testimony that in the lease sale negotiations Texas Eastern had based its position on many factors, including the market price for both gas leases and gas sold under contract, and that the negotiators believed the acquisition price to "be attractive on a comparative basis to the people that will consume this gas" (R. 1712-1715).

3. ARGUMENTS TO THE COMMISSION

After conclusion of the hearing, Texas Eastern moved to omit the presiding examiner's decision. PSC did not object to the motion (R. 3692) which the Commission granted on April 6, 1959 (R. 3700-3702). The examiner thereupon certified the record to the Commission which itself received briefs. Only PSC opposed issuance of the

²² The witness' reference to over 750 billion cubic feet (R. 120) goes to an early reserve estimate of the majority interest, based on more limited tests and drilling. Under the final programming Texas Eastern would acquire a greater interest and even larger reserves.

²³ One such purchaser, Consolidated Edison Company of New York, Inc., is an out-of-state electric utility which directly purchased gas for boiler fuel. The Commission's attempt to foil that transactions by denying a transportation certificate was set aside by the Third Circuit. The Supreme Court has granted petitions for certiorari. See, *infra*, p. 20, note 35.

²⁴ The field is some 19 miles from Texas Eastern's line. Only 22 miles of pipe need be laid down.

certificate applied for, asking that the application be denied or that the "proceeding be remanded to the Presiding Examiner to determine upon what price for the acquisition of the Rayne Field leaseholds, public convenience and necessity would require authorization of the related construction herein proposed by Texas Eastern."²⁵ PSC's principal contention was that the Commission should not certificate construction until it had utilized its "first, last and only opportunity to require producer [i.e., assignor] disclosure of the costs associated with this [Rayne field]

4640

gas".²⁶ Three of Texas Eastern's customers who had previously opposed gas sales by the assignors to Texas Eastern²⁷ voiced no objection to issuance of a certificate for facilities to connect the purchased leases to Texas Eastern's system.²⁸ On June 23, 1959, the Commission issued the order complained of authorizing the construction of facilities and the delivery and sale of gas (R. 3708-3724). 21 FPC 860.

4. THE COMMISSION'S OPINION

The Commission noted that PSC stood alone in opposing Texas Eastern's project. It expressly disclaimed power to certificate the acquisition of the Rayne field leases. It rejected PSC's demand that it look behind the price Texas Eastern would pay the assignors so as to examine the assignors' costs. It did, however, consider both the price to the assignors and the other costs which Texas Eastern

²⁵ PSC brief before the Commission, p. 9.

²⁶ *Id.*, at p. 6.

²⁷ Public Service Electric and Gas Company, Philadelphia Electric Company, and The United Gas Improvement Company.

²⁸ See Public Service Electric and Gas Company's statement in lieu of brief (R. 3696).

(4640)

would incur in connection with the leases as factors bearing upon the "public convenience and necessity" of the proposed project. R. 3716-3717, 21 FPC 863-4.

The Commission analyzed the lease transfer arrangement. It noted that Texas Eastern's costs of operating Rayne field would be reimbursed from the assignor's "production-payment" revenue for the sale of condensate; and that all such revenue would belong to Texas Eastern after 613,406,770 Mcf had been removed (R. 3718, 21 FPC 865, note 6). It found that Texas Eastern had shielded itself from personal liability on the notes (R. 3718, 21 FPC 865). The Commission emphasized the importance and desirability of the very large reserve of 988,771,000 Mcf; it further noted the prospects of even higher recovery and consequent lower unit cost (R. 3719, 21 FPC 865). And the Commission stressed the proximity of Rayne field to

4641

Texas Eastern's system (22 miles) and the low capital cost of attaching the reserve (R. 3719, 21 FPC 866).

The Commission recognized that Texas Eastern had previously contracted to buy Rayne gas from the assignors, through jurisdictional sales, but that the contracts were no longer available to it (R. 3719, 21 FPC 866). The Commission stressed that it had never approved the prices under those terminated contracts. But it pointed out that the unit cost of gas²⁰ under the lease acquisition was less than the price Texas Eastern had previously bargained to pay (R. 3719-3720, 21 FPC 866).

The Commission found nothing unusual about a pipeline company's owning and producing leaseholds for a portion of its gas supply; it found the form of the lease transfer not to be unique in the oil and gas business; and it found the entire transaction to have

²⁰ I.e., the maximum cost per Mcf as developed on the record.

been conducted at arm's length (R. 3721, 21 FPC 867). The Commission noted, as further benefits to Texas Eastern's customers and the public, that the lease purchase transaction avoided future contractual escalations of field price; added flexibility to Texas Eastern's overall operations; and eliminated the chance of "triggering" escalations under "favored-nation" clauses of Texas Eastern and other pipeline gas purchase contracts (R. 3720, 21 FPC 866-7).

Finally, the Commission found that "public convenience and necessity" required Texas Eastern's proposed construction and operation of facilities and sales of gas (R. 3723, 21 FPC 868).

5. PSC's APPLICATION FOR REHEARING

PSC timely filed an application for rehearing pursuant to Section 19 of the Act (R. 3725-3735). It urged the Commission to reconsider the certificate order (issued June 23, 1959) in the light of the Supreme Court's *CATCO* decision, *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378 (June 22, 1959). According to PSC's application for rehearing, the Commission's opinion correctly

4642

treated the public convenience and necessity of "a pipeline project" as being the same whether the applicant buys gas under contracts or buys leases (R. 3727). PSC ignored the fact that in the former case the Commission also determines the public convenience and necessity of the separate application for authority to sell to the pipeline company. PSC's objection seems to have been that the Commission could not lawfully certificate Texas Eastern's project because the instant record would have furnished inadequate basis for authorizing a jurisdictional sale³⁰ of

³⁰ PSC spoke of a hypothetical authorization to "purchase" (R. 3731). Since the Act makes no provision for such certificates, and in view of the context, this seems to be a circumlocution.

(4642)

the gas to Texas Eastern. What evidence, or what sort of evidence was missing PSC did not say, but presumably PSC was interested in the assignors' cost in connection with Rayne field.

PSC did not question any of the Commission's findings other than the ultimate one of "public convenience and necessity."

The Commission denied rehearing on August 21, 1959 (R. 3740, 22 FPC 451). One commissioner dissented. On October 20, 1959, PSC filed the instant petition for review invoking this Court's jurisdiction under Section 19(b) of the Act.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, are Section 7(c) and 4(a), reproduced in the Appendix to PSC's brief at pages A-4 and A-1.

SUMMARY OF ARGUMENT

I.

The order complained of issues a certificate. The certificate authorizes the construction and operation of transportation facilities; it does not authorize the transfer of the Rayne field leases, and PSC effectively concedes that

4643

the Commission lacks certificate jurisdiction over the lease transfer. Nonetheless, PSC's brief attempts to treat this case as if it involves a jurisdictional sale by the assignors to Texas Eastern.

The cost of the leases to Texas Eastern was an issue in the certificate proceeding because the Commission considers all factors bearing on the public interest in passing on the "public convenience and necessity" of a particular

proposal. "All factors" includes matters over which the Commission lacks direct power of compulsion. Here, the Commission properly weighed, in response to PSC's own arguments, Texas Eastern's costs and the impact of the acquisition on jurisdictional activities.

II.

PSC urges that the Commission must delve even deeper and determine the magnitude of the assignors' profits from the non-jurisdictional sale of leases. Anticipating a Texas Eastern rate case, PSC claims the acquisition price was unreasonably high. Yet the price Texas Eastern will pay was negotiated at arm's length for leases not heretofore devoted to public use. PSC's demand that the Commission look behind that price flies in the face of traditional public utility concepts. PSC insists, in effect, that the Commission use its powers over Texas Eastern's rates to regulate the prices at which any businessman may sell goods or services to Texas Eastern. Regulation does not intrude so far into our free economy. The true regulatory issue is whether Texas Eastern's management struck a prudent bargain and whether the acquisition will well or ill serve Texas Eastern's customers and the public at large. The Commission exercised a lawful discretion in determining that issue in Texas Eastern's favor.

ARGUMENT

I.

THE COMMISSION HAS NOT AUTHORIZED THE SALE OF THE RAYNE FIELD LEASES OR THEIR ACQUISITION BY TEXAS EASTERN; IT HAS MERELY CONSIDERED THE ACQUISITION IN AUTHORIZING TEXAS EASTERN TO CONSTRUCT AND OPERATE OTHER FACILITIES

PSC tells this Court at the outset (Br. 17) that it would not be here "[h]ad the Commission limited its authorization" to Texas Eastern's narrow request for a certificate authorizing it only "to construct and operate pipeline facilities—but not "a certificate to authorize it to acquire these (Rayne Field) leases". Curiously enough, the Commission so limited its authorization and held, in the opinion accompanying the order complained of (R. 3716-3717):

Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate.

Patently, then, PSC's opening argument should not be read literally. Its subtle meaning rests in PSC's version of the two "practical effects" of the Commission's order (Br. 19). PSC's first charge, that the Commission sanctioned a payment to the assignors ("producers") equivalent to their *realization* from a 22.89-cent per Mcf "conventional gas sale," is totally unfounded. See, *infra*, p. 19, at note 34. More arguable is the second contention, that the Commission has approved a 22.89-cent per Mcf *cost* of gas as a prudent "operating expense" for purposes of making Texas Eastern's rates. Whether PSC acts prematurely

in anticipating a rate case or not, the Commission would hereafter stand on secure ground in deeming these costs to be admissible in a rate case having here found them prudent. See, *infra*, p. 23. But the controversy here really stems from PSC's assumption that the Commission should treat a nonjurisdictional sale of leases as if it were a jurisdictional sale of gas. The reasons for not doing so turn on

4645

potential issues which PSC chose neither to preserve nor to bring before this Court.

A. The Act Does Not Require That Texas Eastern Secure a Certificate Authorizing Acquisition of the Leases

Section (7c) of the Act requires natural-gas companies to secure a certificate of public convenience and necessity before they "acquire" any "facilities" for jurisdictional transportation or sale of natural gas. The Supreme Court, in *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), held that while even undeveloped leases might be "facilities", they are not "facilities subject to the jurisdiction of the Commission" because Section 1(b) exempts "production or gathering" from the coverage of the Act.³¹ It may elsewhere be argued that the subsequent decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954),³² has eroded the *Panhandle* doctrine. Yet PSC has not challenged the Commission's position that Texas Eastern is free to acquire these developed (but hitherto unoperated) leases without certificate authority, and so

³¹ "Of course leases are an essential part of production." 337 U.S. at 505. "[T]he transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act". 337 U.S. at 515.

³² The Court there held that independent producers are "natural-gas companies" subject to regulation under the Act despite the "production or gathering" exemption.

this Court is barred from considering that question *sua sponte*. *F.P.C. v. Colorado Interstate Gas Co.*, 348 U.S. 492; *cf. Sunray Mid-Continent Oil Co. v. F.P.C.*, No. 335, Oct. Term, 1959, decided June 27, 1960, slip op. p. 19, 28 LW 4584, 4589, at note 22; *Dayton Power and Light Co. v. F.P.C.*, 102 AppDC 164, 251 F. 2d 875; *Street v. F.P.C.*, — AppDC —, 277 F. 2d 357.

4646

B. The Act Does Not Require the Assignors to Secure Either Abandonment Permission or Certificate Authority to Sell Their Leases

The abandonment provisions of the Act, Section 7(b), were construed in *Panhandle, supra*. Accepting that decision, no party has suggested that the Rayne field leases could not be freely abandoned. *Panhandle* similarly exempts the sale of leases from the certificate coverage of the Act. Furthermore, Section 7(c) requires natural-gas companies to secure a certificate of public convenience and necessity prior to engaging in any jurisdictional "sale of natural gas". PSC repeatedly speaks of this sale of leases as differing only in "form" from a contract to sell gas produced by the assignors (Br. 2, 8). PSC girdles quotation marks about the adjective "non-jurisdictional" (Br. 15). The fact remains, however, that PSC never asked the Commission to pierce the "form"; it never urged that "sale of natural gas" has a special meaning in Section 7(c), a meaning broader than technical legal parlance ordinarily permits.

Were the Commission required to assert certificate jurisdiction over the assignors' sale then the *CATCO* decision (*Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378) would squarely apply heré. For *CATCO* concerns the exercise of the direct certificate power over the implementation of contracts to sell. *CATCO* involves Commis-

sion regulation of the seller, and suggests the specific use of certificate power over the seller as an adjunct to regulating his rates. Here, however, *CATCO* simply stands for the proposition that the "public convenience and necessity" standard, even as applied to the buyer, permits a broad inquiry into all factors involving the public interest, including the cost of this gas to the Texas Eastern system. See, *infra*, pp. 20, 27. The distinction counts. For were we dealing, *arguendo*, with certificate applications by the four assignors the Commission would not end its inquiry with the cost of gas to Texas Eastern. The Commission's ultimate focus (whether in a rate case or a certificate proceed-

4647

ing) would rest upon the assignor's jurisdictional revenues as related to their revenue requirements.³³ Thus the critical unit revenue would be 17.15 cents per Mcf;³⁴ both

³³ See *Gulf Oil Corporation*, order issued May 9, 1960, in F.P.C. Docket Nos. G-17973, *et al.* (not yet reported), mimeo. p. 2: "On cross-examination it appeared that the price which the producers were seeking was not related to their revenue requirements, present or future, but represented simply their estimate of the highest price any one of the pipelines might be able to afford in terms of its own consumer market. There is nothing improper or unusual about negotiations on this basis, but it is evident that the prices so arrived at in the present seller's market have little value as an index of the economic conditions of the gas industry or the needs of a particular producer."

³⁴ Our hypothetical treatment of the sale of leases as a sale of gas seems to call for two adjustments to the 17.15-cent figure before it can validly be compared with prices under genuine contracts to sell: A downward adjustment for the value of the condensate Texas Eastern keeps free and clear after the production payment ceases and an upward adjustment for the value of monies received in advance of production. The record does not go far enough to enable such further calculations to the 17.15 cents—which itself depends on a number of assumptions of record. (PSC's accusation (Br. 19), that the "practical effects" of the instant order are "to confer FPC sanction on a payment to natural gas producers equivalent to what they would realize from a conventional gas sale at 22.89¢ per Mcf", may place an esoteric significance upon "practical effects." Otherwise we are at a loss to fathom its basis in the record.)

(4647)

the severance tax paid to Louisiana and the return (and related federal tax) which Texas Eastern feels entitled to on its capitalized investment are unrelated to the assignors' revenues. Since the Commission was not in fact regulating the assignors' sales but only considering the prudence of Texas Eastern's investment and the reasonableness of the expense it incurred the only focus was upon the total unit cost to Texas Eastern.

PSC may mean that the lease-sale "form" of doing business does successfully avoid the reach of the Natural Gas Act and should, for that very reason, be defeated, where possible by denying Texas Eastern's application to construct a lateral to Rayne field. (Such seems to have been the view of the dissenting commissioner. See PSC Br. 18.) While the Commission has so exercised its certificate

4648

powers under different circumstances,³⁵ it here found the lease-purchase "form" to have singular advantages for both Texas Eastern's customers and the general gas-consuming public; accordingly it certificated the construction. See, *infra*, pp. 26-7.

³⁵ *Transcontinental Gas Pipe Line Corp.*, 21 FPC 138, order set aside *sub nom. Consolidated Edison Co. v. F.P.C.*, 271 F. 2d 942 (CA3), petitions for certiorari granted *sub nom. F.P.C. v. Transcontinental*, 362 U.S. 948. There a New York electric utility contracted to buy gas in Texas and hired Transcontinental to transport such gas for its account. Only the transportation was subject to Commission certificate jurisdiction. The Commission denied the application because it disapproved of the impact such purchases could have on prices and gas supplies in general.

C. The Commission Properly Considered the Costs of Texas Eastern's Non-Jurisdictional Acquisition as Bearing Upon the "Public Convenience and Necessity" of Texas Eastern's Project

The Commission lacks the certificate power directly to regulate the transaction between Texas Eastern and its assignors. Nonetheless the Commission may take (and has here taken) the acquisition into account in deciding whether to issue a certificate for the construction of jurisdictional facilities without which Texas Eastern cannot utilize the gas it will produce from the leaseholds. For "[i]t is too late in day to contend that the authority of a regulatory commission does not extend to a consideration of public interests which it may not directly regulate and a conditioning of its orders for their protection." *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 660 (dissent). Cf. *I.C.C. v. Railway Labor Executives Assoc.*, 315 U.S. 373; *National Broadcasting Co. v. United States*, 319 U.S. 190; *City of Pittsburgh v. F.P.C.*, 99 AppDC 113, 237 F.2d 741; but compare *Consolidated Edison Co. v. F.P.C.*, 271 F.2d 942 (CA3), petitions for certiorari granted *sub nom. F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 362 U.S. 948.

As we understand PSC's argument it would concur in the foregoing paragraph (see PSC Br. 18-19).³⁶ But it

4649

then argues, in the alternative, (1) that the Commission's tools of analysis inadequately met the issue (our Argument II. A., *infra*, p. 23, answers that contention) and (2) that, rather than mishandle the job of considering Texas Eastern's acquisition costs, the Commission should expressly have deferred the task until some subsequent Texas

³⁶ Texas Eastern, incidentally, also conceded substantially as much before the Commission.

Eastern rate case. If, as we argue, the Commission need go no further than to investigate Texas Eastern's prudence it seems more desirable to do so now than to try to apply hindsight some months or years hence. On the other hand, assuming, *arguendo*, that the Act requires a probing of the original cost of these leaseholds to the assignors, then such matters can probably still be explored in a rate case in which Texas Eastern attempts to rely on the leasehold costs to it. The entry of certain figures in Texas Eastern's books of account does not control the Commission as to the ultimate accounting to be followed and in any event does not control the disposition of any future rate case.³⁷ The Commission order here fixed none of Texas Eastern's rates to its customers. The opinion discussed Texas Eastern's costs in response to PSC's own demand that it look into these costs. There is no occasion for this Court to decide whether the Commission should (1) have said nothing or (2) taken more evidence and said more. The only possible question on review is whether the Commission could rationally make the finding of "public convenience and necessity" on the evidence it had.

³⁷ The order complained of does not discuss the bookkeeping entries. And the disposition of certain currently pending rate cases may necessitate a reexamination of those accounts. All that has happened here is a determination that the Texas Eastern project is economically feasible even assuming the highest unit cost of gas, that such cost reflects a prudent judgment by Texas Eastern as of the present, and that it represents no hardship to other segments of the public such as justifies defeat of the project.

4650

II

THE COMMISSION COULD REASONABLY DETERMINE THAT "PUBLIC CONVENIENCE AND NECESSITY," REQUIRED TEXAS EASTERN'S PROJECT WITHOUT INQUIRING INTO THE ASSIGNORS' ORIGINAL LEASEHOLD COSTS

The Commission's opinion reveals the nub of PSC's contention as a demand that the Commission "require producer [i.e., assignor] disclosure of the costs associated with this gas and their relation to the sale price' of these leases" (R. 3716). The issue cannot be altered by asking whether the evidence demonstrates that the lease acquisition "payments" are "required by the public convenience and necessity"?³⁸ For the statutory test of "public convenience and necessity" does not postulate the "just and reasonable" standard which governs making or reviewing rates. The rate standard of the Act is found in the provision in Section 4(a) that all natural-gas company rates for "transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable . . ." But the standard of "public convenience and necessity" measures the desirability of a company's embarking upon a new project. It is an all-encompassing standard and not to be applied to each individual issue in a proceeding. As the Supreme Court has explained³⁹ a "public convenience and necessity" test requires the Commission

* * * to bring to bear upon the problem an expert judgment and to determine from its analysis of the

³⁸ PSC's second question presented.

³⁹ *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241. See, also, *National Coal Association v. F.P.C.*, 89 AppDC 135, 140, 191 F. 2d 462, 467; *Oklahoma Natural Gas Co. v. F.P.C.*, 103 AppDC 256, 261, 257 F. 2d 634, 639, certiorari dismissed, 358 U.S. 948.

total situation on which side of the controversy the public interest lies. [Emphasis supplied.]

Thus one cannot speak of a "public convenience and necessity price" (or "rate") as one does of a "just and reasonable rate." To bandy the expression "public convenience

4651

and necessity" about would substitute abstractions for concrete analysis. The cost of acquiring the Rayne leases is part of the "total situation". How should the Commission go about the job of evaluating these costs and their relation to other factors? Where the certificate applicant proposes to make jurisdictional sales under a contract the Commission must remember that the certificate power both supplements the regulation of the seller's rates and tests the buyer's good faith and prudence in entering into the contract. *Atlantic Refining (CATCO)*, *supra*, p. 18. Where, as here, the sale is unregulated the certificate proceeding is an adjunct to regulating the buyer's, Texas Eastern's, business. In both cases the Commission properly considers the impact of the transaction, if consummated, on the industry and public at large. But in the latter instance it does not set out to minimize the seller's profit. As we next show, Texas Eastern, having established its prudence and good faith, was properly issued a certificate.

A. For the Purpose of Regulating Texas Eastern's Rates the Commission May Properly Take Into Account Texas Eastern's Actual Lease Acquisition Costs

The order complained of does not fix any rates which Texas Eastern may charge its customers. It does authorize certain construction, operations, and sales, which will lead Texas Eastern to consummate the lease purchases.

And the record shows Texas Eastern's planned journal entries relating to the costs of these leases. We do not predict the treatment of the lease purchase costs in some future rate case. Bookkeeping entries and accounting analysis do not by themselves control the outcome of rate-making. Nonetheless a summary of the relevant rate principles and issues will scuttle PSC's invocation of "the traditional, familiar 'cost of service' approach" (Br. 24).

Two definitions in the Commission's Uniform System of Accounts for Natural Gas Companies, 18 CFR 201.00-1 *et seq.*, reflect established rate-making principles and suggest the barriers confronting PSC's attempts to go back

4652

to the assignors' ("producers'") original costs. The Uniform System defines "Cost" as the "amount of money actually paid for property or services". 18 CFR 201.01-10; and "original cost" (as applied to gas plant) as "the cost of such property to the person first devoting it to public service", 18 CFR 201.01-29.⁴⁰ These definitions, stemming from the Commission's, and the states', public utility regulatory experience reflect a basic approach,⁴¹ which we briefly set forth, to expensed as well as capitalized costs:

1. Payments to affiliated companies are not accepted at face value. The Commission examines the affiliated seller's costs and profits.⁴² Texas Eastern, however, is not affiliated with any of the assignors; the Commission found that it had negotiated the lease purchases at arm's length and in good faith.

⁴⁰ Emphasis supplied. See, also, "Instructions—Gas Plants," particularly 18 CFR 201.3-3.

⁴¹ See Barnes, *The Economics of Public Utility Regulation* (1942), 405, 607.

⁴² *Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 606-608; *Home Gas Co.*, 2 FPC 402.

(4652)

2. The Commission may look behind payments arrived at through arm's-length bargaining between independent concerns where the property purchased has been devoted to public use by the seller. This is so even if the seller's operations were non-jurisdictional. See *Pennsylvania Electric Co.*, 9 FPC 91, 100, affirmed *sub nom. Pennsylvania Electric Co. v. F.P.C.*, 188 F. 2d 763 (CA3). But PSC does not suggest that the assignors ever devoted their unoperated Rayne field leases to public use.⁴³

4653

3. Other payments, resulting from arm's length bargaining, are accepted at face value if made for property or services which are necessary and proper for the regulated company's business and if reasonable (i.e., not extravagant) in amount.

That a pipeline company needs a gas supply is self-evident; is established as to Texas Eastern in this record; and is liberally conceded by PSC (Br. 20-21). The record similarly contains uncontradicted and convincing evidence of market conditions in the Gulf Coast fields, of intense competition between buyers of gas, and of the inability of Texas Eastern to contract for such a volume of gas unless it was willing to pay such a price (see, pp. 10-11, *supra*). Indeed market conditions had led Texas Eastern previously to contract to pay even a higher unit cost for Rayne field gas.

⁴³ We do not mean to suggest that, had Texas Eastern acquired the leases from a company which previously devoted them to public use, Texas Eastern would be limited to the seller's net cost of acquisition and development. There might be significant reasons, in fixing Texas Eastern's rates, to consider (1) how much it would cost to search for gas before discovering and developing the particular reserves and (2) whether Texas Eastern's rates should not reflect something further as costs of some benefit acquired.

Thus the costs to Texas Eastern were reasonably incurred. "Reasonable" here asks what would a prudent businessman in Texas Eastern's position pay for access to such volumes given the market conditions at the time, not whether "reasonable" in the sense of "just and reasonable" under Section 4(a) and *City of Detroit v. FPC.*, 97 AppDC 260, 230 F. 2d 810, certiorari denied, 352 U.S. 829. (That standard applies only to jurisdictional sales of gas.) The position of assignors and Texas Eastern here is little different from that of a seller and a buyer of land for pipeline right-of-way, steel pipe, or pipeline compressor pumps.⁴⁴ Texas Eastern, as a utility, functions to meet public needs. Commission regulation is designed to assure that utilities operate efficiently and fairly. But the public utility remains a private corporation. The thesis of the Natural Gas Act (and dozens of similar statutes) is that regulated private enterprise, free to make honest business judgments, will bring to the public the benefits of managerial initiative and foresight.

4654

PSC's attack upon Texas Eastern's managerial prudence assumes, in essence, that the impact of rate regulation under the Natural Gas Act may force market prices below their current level in years to come. Whether the level of gas prices in the field declines depends largely on Commission determinations, as yet unmade, of "just and reasonable" jurisdictional rates. Whether these determinations lead to lower or higher prices, the judgment as to Texas Eastern's prudence cannot be based on hindsight. Texas Eastern's customers need the gas now. Texas Eastern had to decide whether buying the leases made sense in

⁴⁴ Following PSC's theory would require the Commission to determine whether the compressor manufacturer's price for his product was commensurate with its costs.

(4654)

terms of the present. Its decision must be evaluated and its prudence judged (either now or later) in terms of market conditions when the purchase is finally consummated.⁴⁵

B. For the Purpose of Determining Texas Eastern's Certificate Application the Commission Properly Considered the Public Interest in a Leasehold Transaction Which Avoids Commission Jurisdiction Over the Assignors

The Commission realized that by the device of selling their leases the assignors escaped regulation of their revenue from Rayne field. Yet the Commission found the benefits inherent in Texas Eastern's owning part of its own gas supply to overbalance any argument in favor of effectively outlawing such transactions. We add but two comments to the Commission's findings (*supra*, p. 13) and the supporting testimony (*supra*, pp. 9-10). First, the Commission looked beyond the narrow interests of Texas Eastern and the particular consumers served by that system. It also considered the weal of other consumers and therefore applauded the fact that a sale of leases cannot

4655

increase anybody else's cost of gas by "triggering" the "favored-nation" clauses in any other pipeline's contracts. Second, this Court is already familiar with the Commis-

⁴⁵ See Barnes, *The Economics of Public Utility Regulation* (1942), 607: "In the regulation of operating expenses, as in other phases of commission control, there is a need of standards or tests of the reasonableness of the sums which the companies claim as necessary expenditures. As the basic principle, there is the requirement that the utility have competent and efficient management, that the owners be responsible for providing honest and efficient management, and that consumers must not be prejudiced by any deficiency in management. It is generally agreed that honesty and efficiency are to be judged in the light of the data available at the time when managerial decisions are reached."

sion's view that ownership by pipeline companies of their own producing facilities serves the public interest. *City of Detroit v. F.P.C.*, 97 AppDC 260, 267, 230 F. 2d 810, 817, certiorari denied, 352 U.S. 829. This Court did there set aside the Commission's rate order. But the rationale was that, even if the Commission may consider such a policy in making rates, it may not increase rates so as to encourage a pipeline to engage in production until it has assured itself that a particular increase is the lowest necessary for that purpose. Only the "just and reasonable" rate standard of Section 4(a) was involved in *City of Detroit*. And this Court, interpreting the decision in *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, rather narrowly confined the Commission to using "cost of service" principles as the "anchor" or point of departure for the regulation of jurisdictional rates. In *City of Detroit* itself, however, this Court had occasion to note the Commission's broader powers under Section 7, the certificate section, to encourage or discourage the particular course which gas company management seeks to steer. 97 AppDC 267, 230 F. 2d 817, at note 10. Cf. *City of Pittsburgh, supra*, 99 AppDC at 123, 237 F. 2d at 751, note 28. Here the Commission's certification will encourage Texas Eastern in securing to the public the benefits of partially owning its own reserves. PSC is dissatisfied with other consequences of the Commission's action. So it asks the Court to reach a contrary conclusion and to substitute its judgment for that of the Commission. But this is in the area which is peculiarly the Commission's, for such consequences are elements of "the public interest" and the Act makes the Commission the arbiter of the paramount public interest. *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 535-6.

(4656)

4656

CONCLUSION

For the foregoing reasons, the order of the Federal Power Commission should be affirmed.

Respectfully submitted,

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

ROBERT L. RUSSELL,
Assistant General Counsel,

DAVID J. BARDIN, *Attorney,*
For respondent.

Federal Power Commission
Washington 25, D. C.

July 11, 1960

[Appendix 3 to Continental Oil Company's Application, consisting of the Judgment and Opinion of the Court of Appeals for the District of Columbia dated December 8, 1961, is not printed at this point in the Joint Appendix since it appears, *supra*, at R. 4038-4044 (J.A. 862-68)].

(4658)

4657

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docketed May 1, 1963

Docket Nos.

TEXAS EASTERN TRANSMISSION
CORPORATION
CONTINENTAL OIL COMPANY

G-12446, G-12447

G-12432

**Application By Texas Eastern Transmission Corporation for
Rehearing of Order Issued April 2, 1963**

NOW COMES Texas Eastern Transmission Corporation (Texas Eastern), pursuant to Section 1.34 of the Commission's Rules of Practice and Procedure and Section 19(a) of the Natural Gas Act, and files this its Application for Rehearing complaining of the Commission's order issued April 2, 1963, in the above captioned proceeding, and, as grounds for this Application for Rehearing, states as follows:

1.

On March 8, 1963, Texas Eastern filed an Application for Rehearing of the Commission's Opinion No. 378 and order issued February 6, 1963, in the above captioned proceeding. The Commission's order issued herein on April 2, 1963, although entitled "Order Granting Applications for Rehearing" does not grant to Texas Eastern any of the relief prayed for in said Application for Rehearing. Quite the contrary, the order of April 2, 1963, in effect rejects all of the grounds and specifications of error relied upon by Texas Eastern in its Application for Rehearing.

4658

2.

Although the Commission's order of April 2, 1963, provides for the possibility of a further evidentiary hearing

(4658)

for Continental Oil Company, Sun Oil Company, General Crude Oil Company and M. H. Marr, said order does not provide for the possibility of any further evidentiary hearing for Texas Eastern or any reconsideration, abrogation or modification of the Commission's Opinion No. 378 on the basis of the existing record. Texas Eastern has not requested, and does not desire, any further evidentiary hearing in this proceeding and is aggrieved by the Commission's order of April 2, 1963, which has the effect of denying Texas Eastern's Application for Rehearing of Opinion No. 378 and order issued February 6, 1963, on the basis of the existing record.

3.

The Commission's order of April 2, 1963, is erroneous and should be set aside for each of the reasons, grounds, and specifications of error set forth in Texas Eastern's Application for Rehearing of Opinion No. 378 and order issued February 6, 1963, which is hereby incorporated herein by reference.

WHEREFORE, Texas Eastern respectfully prays:

- (1) That a rehearing be granted with reference to the Commission's order issued herein on April 2, 1963;
- (2) That on said rehearing the Commission withdraw said

4659

order issued April 2, 1963; and the Commission's Opinion No. 378 and order issued February 6, 1963, and issue a new opinion and order finding that the acquisition cost of the Rayne Field is consistent with the public convenience and necessity and reissuing to Texas Eastern the certificate of public convenience and necessity heretofore issued by the Com-

mission's Opinion No. 322 and order of June 23, 1959, in these proceedings; and

- (3) That Texas Eastern have such other and further relief as may appear to the Commission to be just and proper.

Respectfully submitted,

JACK D. HEAD

Jack D. Head

Vice President and General Counsel
Texas Eastern Transmission Corporation

P. O. Box 2521

Houston 1, Texas

4660

Of Counsel:

W. D. Deakins, Jr., Esquire
Vinson, Elkins, Weems & Searls
First City National Bank Building
Houston 2, Texas

Keith M. Pyburn, Esquire
Texas Eastern Transmission Corporation
Suite 852, Pennsylvania Building
Washington 4, D. C.

Joseph F. Weiler, Esquire
Texas Eastern Transmission Corporation
P. O. Box 2521
Houston 1, Texas

Martin L. Friedman, Esquire
Chapman and Friedman
932 Pennsylvania Building
Washington 4, D. C.

Dated: April 30, 1963.

(4667)

4667

Docketed May 1, 1963

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman;
Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and
Harold C. Woodward.

Texas Eastern Transmission
Corporation, *et al*,

Docket Nos. G-12446, *et al*.

**Order Permitting Intervention. Granting Application for
Rehearing and Denying Stay**

(Issued May 1, 1963)

Applications to intervene and, in the alternative, for rehearing and stay have been filed by H. E. Dishman (Petitioner), with respect to our Opinion No. 378 and Order issued February 6, 1963. In our opinion we found that we had jurisdiction over certain conveyances¹ of gas leasehold interests to Texas Eastern Transmission Corporation (Texas Eastern). Petitioner had made such conveyances.

Petitioner, an individual independent operator, on July 27, 1959 conveyed to Texas Eastern, represented by its subsidiary, the Louisiana Gas Corporation, certain gas interests in petroleum and other mineral leaseholds in the Rayne Field in Louisiana.

Petitioner seeks to intervene on the ground that his interests, as conveyor, holder of securities and mortgage lienholder of gas leasehold interests now held by Texas Eastern in the Rayne Field, are affected by our Opinion No.

¹ Conveyances made by Continental Oil Company, Sun Oil Company, General Crude Oil Company and M. H. Marr.

378 and his rights not adequately represented by existing parties. Petitioner declares that, relying on Commission and court opinions, he had no notice, and was without legal or factual reasons to be on notice, that the Commission would in these proceedings set aside the lease sale arrangement. As stated in our order of April 2, 1963, we find no merit in the contention that the jurisdictional question on the leasehold acquisitions was not argued and at issue in the remanded proceedings. However, due to the complicated procedural situation, recognized in Opinion

4668

No. 378, and the fact that the issue was barely considered and given but passing mention in the earlier phase of these proceedings, and due to the lack of any treatment of petitioner as a party to the proceedings, we shall grant his petition to intervene.

Petitioner made his petition for rehearing in the alternative because of uncertainty as to his status as a party. This question becomes moot upon our grant of his petition to intervene. Before making further disposition of these proceedings, in order to give petitioner an opportunity to be heard on the issues he has raised, we shall grant his application for rehearing, but subject to procedures similar to those imposed in our order of April 2, 1963. In order to discover if a proper disposition of this matter requires a further evidentiary hearing, we shall require that petitioner file within 30 days of this order a pleading setting forth the nature of evidence he proposes to submit and what he intends to prove thereby on the issues raised by his petition for rehearing. These issues are: (1) whether we have jurisdiction over the gas leases involved, (2) or over the transfer of these leaseholds, (3) whether we have jurisdiction to order Petitioner or Continental, if it is still to be considered his representative herein, to file rate schedules and appli-

(4668)

cations for certificates, and (4) whether we have jurisdiction to order Texas Eastern to put into effect a new arrangement for the supply of gas to it, in conformity with Opinion No. 378 and as required by paragraph (B) of the order.

The Commission further finds:

It is in the public interest that the applications for intervention and rehearing filed by H. E. Dishman be granted, subject to the procedures discussed above and set forth below in order paragraph (B). The application for stay pending judicial review is denied.

The Commission orders:

(A) The application for intervention and rehearing filed by H. E. Dishman are hereby granted, but subject to the procedures discussed above and set forth below in paragraph (B).

(B) If H. E. Dishman desires a further evidentiary hearing, he shall notify the commission within 30 days of the issuance of this order setting forth the nature of the evidence he proposes to introduce and what he intends to prove thereby. The evidence shall be confined to the following

4669

issues: (1) whether the Commission has jurisdiction over the gas leases involved in these proceedings, (2) whether the Commission has jurisdiction over the transfer of the gas leases involved herein, (3) whether the Commission has jurisdiction to order Petitioner, or Continental, if it is still to be considered his representative herein, to file rate schedules and applications for certificates, (4) whether we have jurisdiction to order Texas Eastern to put into effect a new arrangement for the supply of gas to it from the Rayne in paragraph (B) of the order, (5) whether the lease sale arrangement herein is in the public interest, and (6)

whether it may be rescinded and another arrangement substituted.

(C) The petition for staying pending judicial review is denied.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

4670

Texas Eastern Transmission Corporation
Docket Nos. G-12446 and G-12447

Continental Oil Company
Docket No. G-12432

May 14, 1963

M. H. Marr
c/o Donley C. Wertz, Esq.
2500 Republic National Bank Building
Dallas, Texas

Dear Mr. Marr:

Reference is made to the "application for rehearing" tendered for filing on April 15, 1963, in the above-designated matters. The "application" is not addressed to a final order and as such is not acceptable for filing. It will be processed as a motion for reconsideration of the Commission's order issued April 2, 1963, and you will be advised of the Commission's action thereon.

The acceptance of the tendered "application for rehearing" as a motion for reconsideration should not be construed that the 30-day provision of Section 19 (b) of the

(4670)

Natural Gas Act as implemented by 1.34 (c) of the Commission's Rules of Practice and Procedure, will apply to the motion.

Very truly yours,

J. H. GUTRIDE
Secretary

cc: May, Shannon and Morley
1700 K Street, N. W..
Washington 6, D. C.

SEC

Gutride, J. H. :mjc
5-14-63

Similar letter to the following:

Sun Oil Company, c/o Robert E. May, May, Shannon and
Morley
1700 K Street, N. W.
Washington 6, D. C.

4671

General Crude Oil Company
c/o Leon M. Payne, Esq.
Andrews, Kurth, Campbell & Jones
25th Floor Humble Building
Houston 2, Texas

Continental Oil Company
c/o Lloyd F. Thanhouser, Esq.
P. O. Box 2197
Houston 1, Texas

Jack D. Head, Vice President and General Counsel
Texas Eastern Transmission Corporation
P. O. Box 2521
Houston 1, Texas

4672

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-12446, G-12447

Texas Eastern Transmission Corporation

Docket No. G-12432

Continental Oil Company

Opinion No. 378-A

Opinion and Order on Rehearing

Issued: July 12, 1963

4673

This Opinion and Order relates to the merits of applications for rehearing by Texas Eastern Transmission Corporation, Continental Oil Company, Sun Oil Company, General Crude Oil Company and M. H. Marr, as well as by intervenor H. E. Dishman, filed with respect to our Opinion No. 378 and Order issued February 6, 1963. In Opinion No. 378 we found that the transaction by which the producers conveyed their leasehold interests in the Rayne Field to Texas Eastern was a sale for resale in interstate commerce subject to our jurisdiction. We therefore deferred decision on Texas Eastern's certificate application until the company and the producers should enter into a new arrangement and make appropriate filings.

In their applications for rehearing Continental and Marr contended that they did not have proper notice that the jurisdictional question was to be considered and were denied due process. We granted rehearing by order of April 2, 1963, which specified that the producers should notify the Commission within thirty days thereafter if they desired to present evidence on the jurisdictional question. On March 6, 1963, H. E. Dishman, a minority lease-

(4673)

holder in the Rayne Field, had petitioned for intervention or in the alternative for rehearing and stay, and by order of May 1, 1963, we permitted him to intervene, granted rehearing with provision for notifying the Commission within thirty days if he wanted to present evidence and denied his request for a stay of the Commission's Opinion No. 378 and Order pending judicial review.

Continental, General Crude, Sun, Marr, and Texas Eastern have filed applications for rehearing of our April 2, 1963 order granting rehearing and have rejected any opportunity to present further evidence.¹

4674

Within the thirty-day period specified in the May 1, 1963 order, Dishman has filed no request to present further evidence. By letters of May 14, 1963, the Secretary of this Commission stated to each of the five applicants for rehearing that the application was not addressed to a final order and as such was not acceptable for filing, but would be processed as a motion for reconsideration of the April 2, 1963 order. While it is now clear that no additional evidentiary hearing is desired by the parties, the issues raised in the original applications for rehearing supplemented by the second round of applications for rehearing are still before us for disposition.

In our Opinion No. 378 we discussed at length the principal issue here, namely our jurisdiction over the transfer of gas leases by the producers to Texas Eastern. We see no need to repeat our discussion of this basic issue. The quick answer to the producers' additional argument that under the law of Louisiana there is no such thing as a sale of gas in place is that we are interpreting and applying the Natural Gas Act, not state law.

¹ The applications of Continental and General Crude contain statements that could be classified as scurrilous. Section 1.15 (f) of our Rules of Practice and Procedure.

Some of the producers also argue that the Internal Revenue Service treatment of the transaction as a capital gain is conclusive and binding upon us. Here again the producers rely on an entirely different statute with different purposes. In *Colorado Interstate Gas Co. v. F.P.C.*, 209 F. 2d 717, 727 (CA10), reversed on other grounds 348 U.S. 492, we were upheld in using a value for depletion at variance with one fixed by the Internal Revenue Service. In support of their contention the producers cite *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381. In that case the Bituminous Coal Commission had determined that the Sunshine Company's coal was bituminous and was not exempt under the Bituminous Coal Act which included provisions for taxation (50 Stat. 72). This determination was affirmed by the Court of Appeals. In a suit to enjoin collection of the tax on bituminous coal the Court held the question of the nature of the coal had already been determined. However, this case is distinguishable from the present case, for the taxing provision was in the Bituminous Coal Act and the Bituminous Coal Commission was given authority to determine who was exempt from the Act and hence exempt from the tax.

The producers again cite *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, in support of their position, but fail to appreciate the significance of the fact that contrary to the situation in the *Panhandle* case the leases in this case were transferred to a pipeline which intended to transport the gas in interstate commerce. The lease transfer transaction, however designated and under whatever provisions of local law, was a means by which the producers were paid for their gas by a pipeline which transported the gas and delivered it to buyers in other states.²

² There are several other matters relating to the jurisdictional problem that deserve comment. We had stated (mimeo p. 8, lines 3-6) that the seller retained management of the field. We did not mean all sellers but only Continental as explained previously (mimeo p. 7, paragraph (4)).

(Contd.)

² (Contd.)

We agree with General Crude that in the *Panhandle* case (337 U.S. at p. 500) the seller of the gas reserves, Panhandle retained an interest in the reserves sold, namely an option to purchase the gas. However, the most important distinction between this case and *Panhandle* remains, for here the sale was made in order to supply the interstate market.

Several of the producers contend that we were incorrect in using 79 percent and 81.5 percent as representing Texas Eastern's original and later interest in the Rayne Field reserves. They argue that the total interest assigned was around 95 percent subject to royalties. This is true enough, but we recognized the distinction between Texas Eastern's own interest and the royalty interest. While the producers argue that there is no royalty gas owned as such, Texas Eastern's vice president referred to Texas Eastern's own gas and the royalty gas as separate and subject to different methods of payment (Tr. 1930). Thus, irrespective of state law, the purchaser thought in terms of buying gas, not merely a leasehold interest.

The producers also point out that for the purposes of the present arrangement Texas Eastern bought and operates a gathering system and central dehydration facilities. With respect to the leasehold transaction they add that instead of 16 promissory notes, there were 16 for each seller. Neither of these corrections we think is material or would change our view of the transaction.

Arguing that the question of jurisdiction has already been settled, Continental cites several cases where a prior determination of a question has been held controlling. These include *Morand Bros. Beverage Co. v. N.L.R.B.*, 204 F. 2d 529 (CA7), certiorari denied 346 U.S. 909, where on remand of a proceeding the Board expressed its disagreement with the court's view of the law on lock-out of employees during a strike, *International Union v. Eagle Picher M. & S. Co.*, 325 U.S. 335, where the Board attempted to change its order with respect to a back-pay formula after the Court of Appeals had held³ the Board's order should be enforced with minor modifications, and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, where the state of Washington argued that the city could not condemn property although this question had already been settled in

³ *Eagle-Picher M. & S. Co. v. N.L.R.B.*, 119 F. 2d 903 (CA8).

favor of the city on appeal from this Commission's order granting a license (*State of Washington Dept. of Comm. v. F.P.C.*, 207 F. 2d 391, 396 (CA9), certiorari denied 347 U.S. 936). None of these cases involved, as did this one, questions of the basic jurisdiction of the agency over a particular type of transaction. It is a well-known principle that the question of jurisdiction,

4676

that is the competency of the administrative agency to act upon the subject matter, is always open for judicial determination. *Borax Ltd. v. Los Angeles*, 296 U. S. 10, 18. This principle has also been applied to reconsideration of jurisdictional questions by administrative agencies where the equities involved so required. See *Davis, Administrative Law* (1958), § 18.07. Moreover in each of the above cases the original holding apparently was fully considered by the court and involved an important issue in the case. In the present case the question of jurisdiction was not in issue and, as the opinions make clear, received little attention. The court found that the Commission in granting a certificate to Texas Eastern had appeared to confer general approval on the pricing aspects of the gas lease acquisitions without sufficient support in the record. The question of jurisdiction over the producers' disposition of the gas was not an issue to be decided, and neither the New York Commission nor any other party contended that this Commission had jurisdiction, or argued any of the considerations in support of such jurisdiction. The two short allusions of the court to the jurisdictional question merely put the quite different problem which was presented for its decision in context. The court itself recognized they were not necessary to the decision stating "[I]t is of no importance here that the transactions by which Texas Eastern proposed to acquire the gas will themselves be, by virtue of a change in form, beyond the regulatory con-

(4676)

trol of the Commission," since the pipeline's construction project was within the Commission's jurisdiction and the Commission was warranted in inquiring into Texas Eastern's costs "regardless of the status of the seller."⁴ The question of jurisdiction has now been raised; we find the question of importance to the execution of our regulatory functions as explained in our Opinion No. 378; and we are of the opinion that it was properly considered.

The producers and Texas Eastern contend that we should not and do not have power to require them to rescind the lease sale arrangement. In our opinion No. 378 we have already discussed why we consider that it is not in the public interest for the Commission to certificate this transaction; it is not necessary to discuss the extent of our power to reform contracts under the Natural Gas Act, for we did not attempt to do so here. In our Opinion No. 378 we required that the producers, Continental, Sun, Marr and General Crude within six months of the issuance of this order make filings of appropriate rate schedules and applications for certificates of public convenience and necessity, and required Texas Eastern to file a revised application for a certificate within the same period. By this we intended to give the parties further opportunity to obtain certificates in these proceedings for a sale of gas which they have consummated at least in part. Without such revised filings we would be

4677

constrained to deny certificates, and, in such case, the parties would be in the position of being in violation of the Natural Gas Act. We did not intend to order the parties to execute a particular kind of contract, or any contract, apart from the necessity of completing the present proceedings. In order to make our meaning clearer we shall revise our finding (7) and ordering clause (B) as

⁴ *P.S.C. of New York v. F.P.C.*, 287 F. 2d at page 146.

shown below. In doing so we shall provide that ordering clause (B) apply to Dishman and any other Rayne Field producers who have entered into lease sale arrangements with Texas Eastern.

Certain of the producers have requested a stay of our Opinion and order. In view of the fact that court proceedings are already in progress, we shall grant such a stay as provided in revised ordering clause (B) below.

The Commission finds:

The applications for rehearing filed by Continental, Sun, Marr, General Crude, Texas Eastern and Dishman present no new facts or principles of law which were not considered by the Commission when it issued its Opinion No. 378 on February 6, 1963, or which having now been considered warrant any change or modification of said order except as stated in our orders of April 2, 1963 and May 1, 1963 or as specified in this Opinion No. 378A and Order.

The Commission orders:

(A) Our Opinion No. 378 and Order issued February 6, 1963 is hereby confirmed as the order of the Commission except as modified by our orders issued April 2, 1963 and by this Opinion No. 378-A and Order, and the motions for reconsideration filed by Continental, General Crude, Sun, Marr, and Texas Eastern are hereby denied.

(B) Finding clause (7) in our Opinion No. 378 and Order issued February 6, 1963 is amended to read as follows:

(7) It is appropriate in the administration of the Natural Gas Act that decision on Texas Eastern's application for a certificate of public convenience and necessity be deferred and that opportunity be afforded for further filings on the part of Texas Eastern and its suppliers of gas.

4678

(C) Ordering clause (B) in our Opinion No. 378 and Order issued February 6, 1963 is amended to read as follows:

(B) Continental, Sun, Marr, General Crude, Dishman and any other Rayne Field producers who have transferred gas leases to Texas Eastern are granted opportunity to make filings of appropriate rate schedules and applications for certificates of public convenience and necessity until six months after the issuance of final mandate upon the completion of court review proceedings herein, and in the same period Texas Eastern may file a revised application for a certificate to put into effect any new arrangement for supply of gas to Texas Eastern from the Rayne Field in conformity with this opinion, the public interest and the Natural Gas Act.

By the Commission, Commissioner Woodward dissenting, filed a separate statement.

/s/ J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

4679

WOODWARD, Commissioner dissenting:

On February 6, 1963 when the original Opinion issued in this proceeding, I did not participate but now that the matter is before us on a Petition For Rehearing, I would prefer to make my views known by issuing the following dissent:

Prior to February 6, 1963, this Commission consistently recognized its unqualified lack of jurisdiction over the sale, purchase or transfer of leasehold interests by natural gas companies. The Supreme Court of the United States,

at the conclusion of its opinion in *Federal Power Commission vs. Panhandle Eastern Pipeline Co.*, 337 U.S. at pp. 515-516 (1949) told the Commission what it could do if it wished to obtain such authority:

"If the Commission is of the opinion that it should have power to control the disposition of leases by natural gas companies, it is authorized to call the attention of Congress to that fact."

In its annual reports to Congress for the past twelve years, the Commission has advocated an amendment to Section 7 of the Natural Gas Act which would vest it with jurisdiction over transfer of leaseholds by natural gas companies.¹ In spite of these pleas in each instance the Congress has not acted to confer upon this Commission the power which, clearly, it does not presently possess. In this proceeding, the Commission commits grave error in attempting to exercise jurisdiction in areas forbidden to it by the Congress and the Supreme Court of the United States. To attain its objective, the Commission is now saying that any sale of property which contains gas in formation is subject to its jurisdiction. Without question, this is an unlawful assumption of jurisdiction.

"Great weight" must be given to an agency's consistent interpretation of the law it administers, especially where the agency has sought to have the law amended, but Congress has declined to do so and has thereby acquiesced in the agency's historical interpretation.²

¹ 31. FPC Ann. Rep. 145 (1951); 32 FPC Ann. Rep. 152 (1952); 33 FPC Ann. Rep. 125 (1953); 34 FPC Ann. Rep. 170 (1953); 35 FPC Ann. Rep. 182 (1955); 36 FPC Ann. Rep. 19 (1956); 37 FPC Ann. Rep. 25 (1957); 38 FPC Ann. Rep. 18 (1958); 39 FPC Ann. Rep. 21 (1959); 40 FPC Ann. Rep. 19 (1960); 41 FPC Ann. Rep. 3 (1961); 42 FPC Ann. Rep. 14 (1962).

² *United States v. Bergh*, 352 U.S. 40, 47 (1956); *Gas Service Company v. Federal Power Commission*, 282 F. 2d 496, 499 (D.C. Cir. 1960); *Mississippi Valley Gas Co. v. Federal Power Commission*, 294 F. 2d 588, 592 (5th Cir. 1961).

The Commission's assertion of jurisdictional authority over the sale of leasehold rights in Rayne Field, on the basis of an unsupported vague and obscure dissertation, is a complete reversal of its prior position in these proceedings. At no time did the Commission so much as infer that it might possess or exercise jurisdiction over the Rayne Field leaseholds. Opinion 322, issued June 23, 1959, granted Texas Eastern's application for certification and the Commission explicitly declared (mimeo pp. 5-6; 21 F.P.C. 860 at p. 864):

"Texas Eastern has not filed an application for a certificate authorizing acquisition of the Rayne Field leases and *we have no authority to issue such a certificate.* (Emphasis supplied)."

The Public Service Commission of the State of New York appealed Opinion 322 before the U. S. Court of Appeals for the District of Columbia Circuit. In its brief, the Commission affirmed its position that it lacked jurisdiction over the Rayne Field leasehold sale stating:

"The Commission order does not authorize the purchase of lease—*undisputably such authorization is outside its jurisdiction* (infra, p. 17, emphasis supplied)."

The Court of Appeals disposed of the New York Commission appeal by holding (287 F. 2d at pp. 145, 146):

"It is of no importance here that the transaction by which Texas Eastern proposes to acquire gas will themselves be, by virtue of the change in form, beyond the regulatory control of the Commission."

In my judgment, that opinion conclusively settled the jurisdictional question. The leasehold sale was not a sale in

interstate commerce; it affected only rights and interests in real property located wholly within the State of Louisiana. Any other conclusion disparages the Court of Appeals adjudication—this fact is indisputable. If permitted, this Commission's course of action would destroy the rights of parties to court review and render the decision of the courts meaningless.

Apart from its misapplication of the statute, the majority errs in attempting to force the parties herein to revise their contracts. The Natural Gas Act is the only source of this Commission's authority and there is nothing in the Act which confers such absolute power on the Commission. The majority cannot, by decree, force a meeting of the minds of the parties here involved.

4681

Moreover, in a Section 7 proceeding, the Commission must make findings, in accordance with the statute, of present or future, rather than past, public convenience and necessity, *City of Pittsburgh v. FPC*, 237 F. 2d 741, 752; *Panhandle Eastern Pipeline Co., v. FPC*, 236 F. 2d 289, 292. Here, the Commission's attempt to impart retroactive effect to its findings is totally invalid.

Rehearing should be granted and Opinion No. 378, and Order, issued February 6, 1963, should be reversed and set aside.

/s/ HAROLD C. WOODWARD
Harold C. Woodward
Commissioner

4682

BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

Docket Nos. G-12446, G-12447

Texas Eastern Transmission Corporation

Docket No. G-12432

Continental Oil Company

Docketed July 25, 1963

Application for Rehearing by Sun Oil Company

Comes now Sun Oil Company ("Sun") and, pursuant to the provisions of Section 19(a) of the National Gas Act and Section 1.34 of the Commission's Rules of Practice and procedure, being aggrieved, hereby applies for rehearing of the Commission's Opinion No. 378-A in the above-entitled proceedings, issued on July 12, 1963 and of Opinion No. 378, issued February 6, 1963 as modified by the Commission's orders issued April 2, 1963 and May 1, 1963 and by Opinion No. 378-A. In support of this application for rehearing, Sun states as follows:

I.

In Opinion No. 378-A, entitled "Opinion and Order on Rehearing" the Commission (Commissioner Woodward dissenting) has reiterated and reaffirmed the unlawful assumption of jurisdiction over the assignment and conveyance by Sun of gas leasehold located in the Rayne Field, Acadia Parish,

4683

Louisiana, to Louisiana Gas Corporation, an affiliate of Texas Eastern Transmission Corporation ("Texas Eastern"), which the Commission had previously asserted in

Opinion No. 378 and in its order issued April 2, 1963. In reaffirming this erroneous finding and conclusion the Commission has, in Opinion No. 378-A, advanced additional legally untenable positions and arguments in an attempt to justify its unlawful assertion of jurisdiction and Sun therefore applies for rehearing of this latest Opinion and Order.

II.

In the first complete paragraph on page 2 of its Opinion No. 378-A the Commission states that it sees "no need to repeat" its discussions of the jurisdictional issue but then asserts that the "quick answer to the producers' additional argument that under the law of Louisiana there is no such thing as a sale of gas in place is that we are interpreting and applying the Natural Gas Act, not state law." In this summary and superficial fashion the Commission attempts to deal with the valid legal objection which Sun registered in its application for rehearing of Opinion No. 378, to the Commission's inaccurate, misleading and illegal characterization of this transaction as an "in-place sale of the Rayne Field gas to Texas Eastern." The Commission does not even attempt to dispute the fact, as stated in Sun's

4684

application for rehearing, that under Louisiana law there is no legally recognizable sale of gas in place; that one may only own the land or the right to produce minerals therefrom or may own gas after severance by production; and that no one can own, or sell, gas in place in Louisiana. This invalid "in place" characterization by the Commission, as well as its equally invalid "in bulk" terminology employed in its Opinion No. 378, were obviously purposely used to convey the erroneous impression that the sale of gas leases involved was tantamount to a "wholesale" sale and thus within the Commission's jurisdiction. This distorted char-

acterization and interpretation of the nature of the transaction is as invalid under the National Gas Act as it is under Louisiana law, and the Commission may not legally change its essential nature on the premise that it is "interpreting and applying the Natural Gas Act, not state law."

III.

In Opinion No. 378-A the Commission attempts to refute Sun's claim of error because the Commission disregarded the determination and ruling of the Internal Revenue Service that the sales in the form described in the lease Sale Agreement were of leasehold rights subject to tax treatment as capital gains rather than sales of gas subject to treatment as normal income. The Commission's citation

4685

of the case of *Colorado Interstate Gas Co. v. F.P.C.*, 209 F. 2d 717, 727, in an attempt to support its disregard of the ruling of the Internal Revenue Service is entirely misplaced as that case does not constitute a valid precedent for the Commission's action here. As the Court pointed out in that case, the Internal Revenue Service's action there involved was adopted "for another purpose and at another time" that is, it was "adopted six years before." On the contrary, in this case, the ruling of the Internal Revenue Service was obtained in connection with and was part and parcel of the same transaction. As a matter of fact, obtaining the ruling was a condition attached to the consummation of the transaction itself. The Commission's further attempt to distinguish the case of *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, is equally invalid. In that case the Supreme Court, among other things, stated that there "is privity between officers of the same government" and that "the principles of res judicata apply to questions of jurisdiction as well as to other matters—whether it be

jurisdiction of the subject matter or of the parties." These principles are applicable here.

IV.

In the last complete paragraph on page 2 of Opinion No. 378-A the Commission again makes a vain and

4686

futile effort to distinguish the Supreme Court's decision in *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this time on the primary and apparently the sole ground "that contrary to the situation in the *Panhandle* case the leases in this case were transferred to a pipeline which intended to transport the gas in interstate commerce." Again, in footnote 2 on page 3 of Opinion No. 378-A the Commission abandons its other unsuccessful attempts to distinguish the *Panhandle* case, previously attempted in Opinion No. 378 and states "However, the most important distinction between this case and *Panhandle* remains, for here the sale was made in order to supply the interstate market." The Commission's total disregard of the limitations upon its jurisdiction contained in the Natural Gas Act and its failure and refusal to recognize any such limitations is clearly evident from its language on page 2 of Opinion No. 378-A where it states:

"... The lease transfer transaction, however designated and under whatever provisions of local law, was a means by which the producers were paid for their gas by a pipeline which transported the gas and delivered it to buyers in other states."

Under the foregoing language, the Commission has asserted unlimited jurisdiction and authority over any means by which the owners of properties capable of producing gas are paid for the sale of such properties, provided only that the gas subsequently produced from such properties

moves in interstate commerce. In the first place, the use of the term "producers" to describe the parties who sold and conveyed the leases to Texas Eastern in this transaction is incorrect and misleading. Texas Eastern alone was and is the "producer" of gas from the leases which were sold and conveyed to it by this transaction. In the second place, the broad assertion of jurisdiction by the Commission is wholly illegal and disregards and repudiates the limitations upon its jurisdiction heretofore repeatedly recognized by the Commission itself and the courts. In direct refutation of the Commission's attempt here to expand its jurisdiction beyond that conferred by the Natural Gas Act, and contrary to the Commission's futile effort to distinguish the *Panhandle* case on the ground that the gas to be produced from the leases there involved was to move intrastate instead of interstate, the Supreme Court's decision in the *Panhandle* case was predicated upon the absence of jurisdiction over gas leases because they are production facilities and the transfer of such gas leases involves a production activity over which the Commission has no jurisdiction. Specifically, the Supreme Court did not base its decision upon the circumstances that the gas involved in the *Panhandle* case was to move intrastate instead of interstate, and the Commission's attempt to distinguish the case on that ground is without any foundation whatsoever.

In footnote 2, on pages 2 and 3 of Opinion No. 378-A the Commission retreats somewhat from several of its erroneous statements and conclusions in Opinion No. 378 which were pointed out in Sun's previous applications for hearing. However, the Commission characterizes these corrections as not "material" or would not "change our view of the transaction." This attitude of the Commission

serves to emphasize that it is determined to assert jurisdiction over this transaction, irrespective of any misunderstandings it may have had of the factual situation and that it has repeatedly shifted its grounds for asserting jurisdiction, all in defiance of previous Commission and Court precedent to the contrary.

V.

On pages 3 and 4 of Opinion No. 378-A the Commission attempts to avoid its own previous holding that it lacks jurisdiction in this case over the transfer of gas leases involved, and the affirmance of this lack of jurisdiction by the Court of Appeals for the District of Columbia Circuit, by misplaced reliance upon statements such as it "is a well-known principle that the question of jurisdiction, that is the competency of the administrative agency to act upon the subject matter, is always open for judicial determination." In support of this statement, the Commission cites *Borax*,

4689

Ltd. v. Los Angeles, 296 U.S. 10, 18. The misuse of this case for the purpose stated is apparent. On the page reference given by the Commission the Supreme Court did not use the language attributed to it, namely, that the question of jurisdiction "is always open for judicial determination." On the contrary, the Court stated "the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always *one* for judicial determination." Thus, in its paraphrase of the Court's language, the Commission has changed and distorted the entire meaning of the Court's language. As a matter of fact, this case supports our own contention here, that the jurisdictional issue was a matter for *judicial* determination and that *judicial* determination

(4689)

was previously made by the Court of Appeals for the District of Columbia Circuit.

The Commission's reliance upon Davis, *Administrative Law* (1958), § 18.07, is also misplaced. Davis, based upon a review of the authorities, states that to "say that a tribunal cannot confer power upon itself merely by making a finding that it has jurisdiction is entirely logical." Moreover, Davis states, "But equally logical is the proposition that every tribunal has jurisdiction to determine its own jurisdiction and that if the parties have litigated the question of jurisdiction once, the policies against relitigation are fully applicable."

4690

VI.

In Opinion No. 378-A the Commission continues to make the wholly unwarranted and inaccurate assertion that the jurisdictional question was not "in issue" and "received little attention" in the case of *Public Service Commission v. F.P.C.* 287 F. 2d 143, 145, 146, in the District of Columbia Circuit involving review of the Commission's Opinion No. 322, in which the Commission itself held that it lacked jurisdiction. As we have previously pointed out, the Commission's brief in that court case is replete with references and arguments supporting its lack of jurisdiction. And the court itself stated unequivocally that "the Commission has been held to lack jurisdiction over gas leases," citing in support of this legal conclusion *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. At another point in its decision, the District of Columbia Circuit referred to the transactions as "beyond the regulatory control of the Commission."

It is incomprehensible to us how the Commission can now validly claim that the jurisdictional question was not "in issue" and "received little attention" in the prior

court proceedings. The Commission's lack of jurisdiction over the gas leases involved was the fundamental premise upon which both the Commission and the Court acted and both

4691

the Commission and the Court relied upon the *Panhandle* case in reaching this conclusion. In sum and substance, the Commission now seeks to repudiate not only its own prior decisions but the decision of the District of Columbia Circuit as well. In this effort, the Commission has repeatedly resorted to the ineffectual and inaccurate device of accusing the Court of paying "little attention" to the jurisdictional question.

VII.

On pages 4 and 5 of Opinion No. 378-A the Commission attempts to meet our contention that it lacks legal power to require a "new arrangement," as provided for in Opinion No. 378, by now asserting, in Opinion No. 378-A, that "it is not necessary to discuss the extent of our power to reform contracts under the Natural Gas Act, for we did not attempt to do so here." The Commission now states that it "intended to give the parties further opportunity to obtain certificates in these proceedings for a sale of gas which they have consummated at least in part." Furthermore, the Commission now states:

"... Without such revised filings we would be constrained to deny certificates, and, in such case, the parties would be in the position of being in violation of the Natural Gas Act. We did not intend to order the parties to execute a particular kind of contract, or any contract, apart from the

necessity of completing the present proceedings: In order to make our meaning clearer we shall revise our finding (7) and ordering clause (B) as shown below."

A comparison of finding (7) and ordering clause (B), as contained in Opinion No. 378, with the similar provisions in Opinion No. 378-A, shows that the Commission has purportedly substituted for the mandatory language of Opinion No. 378 the permissive language "opportunity be afforded for further filings" and "opportunity to make filings," in Opinion No. 378-A. In this fashion the Commission apparently believes that it can successfully escape its lack of legal power to require the execution of new contracts or "new arrangements." While the Commission purportedly makes it permissive, rather than mandatory, for revised filings to be made, it has at the same time declared that unless such "revised filings" are made "the parties would be in the position of being in violation of the Natural Gas Act." Thus, these modifications of Opinion No. 378 contained in Opinion No. 378-A, constitute an indirect, rather than a direct, means of attempting to force revised filings to be submitted and are as patently unlawful as the mandatory requirement of Opinion No. 378.

VIII.

In its modified finding clause (7), as set forth on page 5 of its Opinion No. 378-A, the Commission erroneously

purports to offer opportunity for "further filings on the part of Texas Eastern and its suppliers of gas." This finding and statement of the Commission is erroneous for the reason that it improperly refers to Sun and to other sellers of leases as suppliers of gas, a term which in its normal and

accepted understanding applies only to those engaged in the production and delivery of gas to another. Sun and the other sellers having disposed of their gas leasehold interests and at no time being engaged in the production of such gas for delivery to Texas Eastern are not "suppliers of gas." Furthermore, such finding implies that Sun and the other parties who sold gas leaseholds have "filings" of some sort presently before the Commission, contrary to fact. There are no "further filings" for Sun to make because it has no present filings before the Commission.

IX.

The Commission is in error in its ordering clause (B) as set forth in Opinion No. 378-A, page 6, by inconsistently purporting to grant opportunity to make filings of appropriate rate schedules and applications for certificates of public convenience and necessity to Sun and others characterized as "Rayne Field producers" while at the same time recognizing that they have transferred their gas leases.

4694

It is further evident that it is neither possible nor appropriate for parties without ownership of leases to file rate schedules or applications for certificates of public convenience and necessity with respect to any production or any sale of gas from leases which they do not own.

X.

On pages 4 and 5 of Opinion No. 378-A the Commission states that "Without such revised filings we would be constrained to deny certificates, and, in such case, the parties would be in the position of being in violation of the Natural Gas Act." This assertion that the parties would be in violation of the Natural Gas Act has not heretofore been mentioned in previous Commission orders and apparently has now being resorted to by the Commission as a means by

(4694)

which it seeks to compel or force the parties selling the gas leaseholds to Texas Eastern to make filings. The purpose of this requirement is apparent. The Commission has in effect threatened to invoke the penalty provisions of the Natural Gas Act as a sanction for non-compliance with its unlawful orders. This approach is beyond any legal authority conferred upon the Commission by the Natural Gas Act. In refutation of this statement by the Commission, Sun asserts that it has not violated the Natural Gas Act and cannot lawfully be subjected to any of the penalties prescribed by that Act.

4695

XI.

In Opinion No. 378-A the Commission has ordered that its Opinion No. 378 be confirmed except as modified by its orders issued April 2, 1963 and May 1, 1963 and by Opinion No. 378-A, and has modified or altered the language of finding clause (7) and ordering clause (B) of its Opinion No. 378. As a result of these generalized modifications or changes in its original Opinion No. 378, and by carrying forward the composite of four separate orders without clearly or definitely identifying the changed modifications of the earlier orders, the Commission has created a situation which renders its various orders vague, indefinite, uncertain and, in many respects, unintelligible and inconsistent, and its orders are accordingly invalid on this additional ground.

XII.

In view of the fact that the Commission, in Opinion No. 378-A, purports to confirm its previous Opinion No. 378 as modified by its further orders of April 2, 1963 and May 1, 1963 and has not, in its further Opinion No. 378-A, dealt with or attempted to meet many of the grounds of error which were asserted in Sun's previous application for re-

hearing of Opinion No. 378, filed on March 6, 1963, and its application for rehearing of the Commission's order of April 2, 1963,

4696

filed on April 17, 1963, these applications for rehearing are hereby incorporated by reference herein and made a part hereof.

WHEREFORE, for all of the foregoing reasons, Sun requests the Commission to grant this application for rehearing and to reverse and set aside its Opinion No. 378, its orders of April 2, 1963 and May 1, 1963 and its Opinion No. 378-A.

Respectfully submitted,

SUN OIL COMPANY

BY ROBERT E. MAY

ROBERT E. MAY
Its Attorney

John A. Ward, III
Phillip D. Endom
1608 Walnut Street
Philadelphia 3, Pennsylvania

Joiner Cartwright
Herf M. Weinert
P. O. Box 2831
Beaumont, Texas

Robert E. May
May, Shannon and Morley
1700 K Street, N.W.
Washington 6, D. C.
Attorneys for Sun Oil Company

Martin A. Row
P. O. Box 2880
Dallas, Texas
Of Counsel

(4697)

4697

DISTRICT OF COLUMBIA) ss:

Robert E. May, being first duly sworn, deposes and says that he is an attorney for Sun Oil Company; that as such he has signed the foregoing "Application for Rehearing by Sun Oil Company" for and on behalf of said Company; that he is authorized so to do; that he has read said Application and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

ROBERT E. MAY
Robert E. May

Subscribed and sworn to before me, a Notary Public, this 25th day of July, 1963.

THOMAS C. EVANS
Thomas C. Evans
Notary Public

(SEAL)

My Commission expires September 14, 1965.

4698-4701

CERTIFICATE OF SERVICE

4702

BEFORE THE FEDERAL POWER COMMISSION

(Docketed Jul 29, 1963)

In the Matters of

Docket Nos. G-12446, G-12447

Texas Eastern Transmission Corporation

Docket No. G-12432

Continental Oil Company

Application for Rehearing by M. H. Marr

Comes now M. H. Marr ("Marr") and, pursuant to the provisions of Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, being aggrieved, hereby applies for rehearing of the Commission's Opinion No. 378-A and accompanying order issued in the above-entitled proceeding on July 12, 1963. In support of this application for rehearing, Marr states as follows:

I.

In Opinion No. 378-A, entitled "Opinion and Order on Rehearing," the Commission (Commissioner Woodward dissenting) has reiterated and reaffirmed the unlawful assumption of jurisdiction over the sale by Marr, with certain reservations, of oil and gas leases in the Rayne Field, Acadia Parish, Louisiana, to Louisiana Gas Corporation, an affiliate of Texas Eastern

4703

Transmission Corporation ("Texas Eastern"), which the Commission had previously asserted in Opinion No. 378 and in its order issued April 2, 1963. In reaffirming this erroneous finding and conclusion the Commission has, in Opinion No. 378-A, advanced new and additional legally

(4703)

untenable arguments in an attempt to justify its unlawful assertion of jurisdiction, and Marr therefore applies for rehearing of this latest Opinion and Order.

II.

Contrary to the statement on page 1 of the Commission's Opinion No. 378-A, Marr did not contend that its denial of notice was confined to consideration of "the jurisdictional question." Moreover, the Commission's Opinion No. 378-A is in error in stating that (p. 2) "no additional evidentiary hearing is desired by the parties." As was made clear in the application for rehearing filed on March 7, 1963, (pp. 4-7), Marr contended that he was denied any notice of the matters considered and disposed of by Opinion No. 378 and accompanying order of February 6, 1963, and did not confine his allegation of error to a denial of notice with respect to the question of jurisdiction. Similarly, with respect to his request for a hearing, Marr's complaint is that he is entitled to a full hearing contemplating the introduction of evidence,

4704

the right to cross-examine and to present argument orally and in briefs. The Commission's order of April 2, 1963, effectively denied Marr the full hearing which was requested and to which he is entitled and such denial deprived Marr of due process in violation of the Natural Gas Act and the Administrative Procedure Act.

III

In the first complete paragraph on page 2 of its Opinion No. 378-A the Commission states that it sees "no need to repeat" its discussions of the jurisdictional issue but then asserts that the "quick answer to the producers' additional argument that under the law of Louisiana there is no such thing as a sale of gas in place is that we are interpreting

and applying the Natural Gas Act, not state law." In this summary fashion the Commission attempts to deal with the valid legal objection which Marr registered in his application for rehearing of Opinion No. 378, to the Commission's inaccurate and illegal characterization of this transaction jurisdiction question. The leasehold sale was not a sale in as an "in-place sale of the Rayne Field gas to Texas Eastern." The Commission does not even attempt to dispute the fact, as stated in Marr's application for rehearing, that under Louisiana law there is no legally recognizable sale of gas in place;

4705

that one may own the land or the right to produce minerals therefrom or may own gas after severance and capture by production; and that no one can own, or sell, gas in place in Louisiana. This invalid "in place" characterization by the Commission was obviously used to convey the erroneous impression that the sale of the gas leases involved was equivalent to a "wholesale" sale and thus within the Commission's jurisdiction. This distorted interpretation of the nature of the transaction is as invalid under the Natural Gas Act as it is under Louisiana law, and the Commission may not legally change its nature on the premise that it is "interpreting and applying the Natural Gas Act, not state law."

It is the Louisiana law which determines the legal consequences and the character of the transaction and not the Natural Gas Act. The sale must be construed in the light of the Louisiana law as interpreted by the Courts of that State.

IV.

In Opinion No. 378-A the Commission attempts to refute Marr's claim of error because the Commission disregarded

(4705)

the determination and ruling of the Internal Revenue Service that the sales in the form described in the lease Sale Agreement were of leasehold rights subject to capital gains rate rather than ordinary rates. The Commission's citation of the

4706

case of *Colorado Interstate Gas Co. v. F.P.C.*, 209 F. 2d 717, 727, in an attempt to support its disregard of the ruling of the Internal Revenue Service is entirely misplaced as that case does not constitute a valid precedent for the Commission's action here. As the Court pointed out in that case, the Internal Revenue Service's action there involved was adopted "for another purpose and at another time" that is it was "adopted six years before." In this case, the ruling of the Internal Revenue Service was obtained in connection with and was an integral part of the same transaction. As set forth in Marr's original application for rehearing, obtaining the ruling was a condition precedent to the consummation of the transaction itself and was a critical consideration in Marr's decision to enter into the transaction.

V.

In the last complete paragraph on page 2 of Opinion No. 378-A the Commission again makes a futile effort to distinguish the Supreme Court's decision in *F.P.C v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this time on apparently the sole ground "that contrary to the situation in the *Panhandle* case the leases in this case were transferred to a pipeline which intended to transport the gas in interstate commerce."

4707

But it must be recognized that the Commission's concern was related directly to the problem as to the effect the transaction would have on the interstate service of Pan-

handle to which the acreage there involved had been previously dedicated.

Again, in footnote 2 on page 3 of Opinion No. 378-A the Commission abandons its other unsuccessful attempts to distinguish the *Panhandle* case, previously attempted in Opinion No. 378, and states "However, the most important distinction between this case and *Panhandle* remains, for here the sale was made in order to supply the interstate market." The Commission's total disregard of the limitations upon its jurisdiction contained in the Natural Gas Act and its refusal to recognize any such limitations is clearly evident from its language on page 2 of Opinion No. 378-A where it states:

"... The lease transfer transaction, however designated and under whatever provisions of local law, was a means by which the producers were paid for their gas by a pipeline which transported the gas and delivered it to buyers in other states."

Under the above quoted language, the Commission has asserted unlimited jurisdiction over any "means by which the producers were paid for their gas by a pipeline" provided only that the gas subsequently moves in interstate commerce. In the first place, the use of the term "producers" to describe

4708

the parties who sold and conveyed the leases to Texas Eastern is incorrect and misleading. Texas Eastern alone was and is the "producer" of gas from the leases which were sold and conveyed to it.

In the second place, the broad assertion of jurisdiction by the Commission is wholly illegal and repudiates the limitations upon its jurisdiction heretofore repeatedly recognized by the Commission itself and by the courts. In direct

(4708)

refutation of the Commission's attempt here to expand its jurisdiction beyond that conferred by the Natural Gas Act, and contrary to the Commission's futile effort to distinguish the *Panhandle* case on the ground that the gas reserves there involved were to move intrastate instead of interstate, the Supreme Court's decision in the *Panhandle* case was predicated upon the absence of jurisdiction over gas leases because they are production facilities and the sale of such gas leases involves a production activity over which the Commission has no jurisdiction. Specifically, the Supreme Court did not base its decision upon the circumstances that the gas involved in the *Panhandle* case was to move intrastate instead of interstate, and the Commission's attempt to distinguish the case on that ground is without any foundation whatsoever.

In footnote 2, on pages 2 and 3 of Opinion No. 378-A the Commission retreats somewhat from several of its erroneous-

4709

statements and conclusions in Opinion No. 378 which were pointed out in Marr's previous applications for rehearing. However, the Commission characterizes these corrections as not "material" or would not "change our view of the transaction." This attitude of the Commission serves to emphasize that it is determined to assert jurisdiction over this sale in defiance of previous Commission and Court precedents to the contrary.

VI.

On pages 3 and 4 of Opinion No. 378-A the Commission attempts to avoid its own previous holding that it lacks jurisdiction in this case over the sale of the gas leases involved, and the affirmance of this lack of jurisdiction by the Court of Appeals for the District of Columbia Circuit, by

misplaced reliance upon statements such as it "is a well-known principle that the question of jurisdiction, that is the competency of the administrative agency to act upon the subject matter, is always open for judicial determination." In support of this statement, the Commission cites *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 18. The misuse of this case for the purpose stated is apparent. On the page reference given by the Commission the Supreme Court did not use the language attributed to it, namely, that the question of jurisdiction "is always open for judicial determination." On the contrary, the Court

4710

stated "the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always *one* for judicial determination." Thus, in its paraphrase of the Court's language, the Commission has changed the entire meaning of the Court's language. As a matter of fact, this case supports our own contention here, that the jurisdictional issue was a matter for *judicial* determination and that judicial determination was previously made by the Court of Appeals for the District of Columbia Circuit.

The Commission also cites Davis, *Administrative Law* (1958), § 18.07, to support a statement that this "principle has also been applied to reconsideration of jurisdictional questions by administrative agencies where the equities involved so required." The first paragraph of the section cited begins with the statement which fully supports our own contention in this case, that to "say that a tribunal cannot confer power upon itself merely by making a finding that it has jurisdiction is entirely logical." Moreover, the next sentence states, "but equally logical is the proposition that every tribunal has jurisdiction to determine its own jurisdiction and that if the parties have litigated the

(4710)

question of jurisdiction once, the policies against relitigation are fully applicable."

4711

Thus the Davis treatise, cited in Opinion No. 378-A, does not lend support to but is actually contrary to the Commission's contentions here.

VII.

In Opinion No. 378-A the Commission continues to make the wholly inaccurate assertion that the jurisdictional question was not "in issue" and "received little attention" in the case of *Public Service Commission v. F.P.C.*, 287 F. 2d 143, 145, 146, in the District of Columbia Circuit involving review of the Commission's Opinion No. 322, in which the Commission itself held that it lacked jurisdiction. As we have previously pointed out, the Commission's brief in that court case is replete with references and arguments supporting its lack of jurisdiction. And the Court itself stated unequivocally that "the Commission has been held to lack jurisdiction over gas leases," citing in support of this legal conclusion *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. At another point in its decision, the District of Columbia Circuit referred to the sale as "beyond the regulatory control of the Commission."

It is incomprehensible to us how the Commission can now validly claim that the jurisdictional question was not

4712

"in issue" and "received little attention" in the prior court proceedings. The Commission's lack of jurisdiction over the sale of the gas leases involved was the fundamental premise upon which both the Commission and the Court acted and both the Commission and the Court relied upon the *Panhandle* case in reaching this conclusion. Actually, the Commission now seeks to repudiate not only its own prior

decisions but the decision of the District of Columbia as well. In this effort, the Commission has repeatedly resorted to the inaccurate device of accusing the Court of paying "little attention" to the jurisdictional question.

VIII.

On pages 4 and 5 of Opinion No. 378-A the Commission attempts to meet our contention that it lacks legal power to require a "new arrangement," as provided for in Opinion No. 378, by now asserting, in Opinion No. 378-A, that "it is not necessary to discuss the extent of our power to reform contracts under the Natural Gas Act, for we did not attempt to do so here." The Commission now states that it "intended to give the parties further opportunity to obtain certificates in these proceedings for a sale of gas which they have consummated at least in part." Furthermore, the Commission now

4713

states:

" . . . Without such revised filings we would be constrained to deny certificates, and, in such case, the parties would be in the position of being in violation of the Natural Gas Act. We did not intend to order the parties to execute a particular kind of contract, or any contract, apart from the necessity of completing the present proceedings. In order to make our meaning clearer we shall revise our finding (7) and ordering clause (B) as shown below."

A comparison of finding (7) and ordering clause (B), as contained in Opinion No. 378, with the similar provisions in Opinion No. 378-A, shows that the Commission has purportedly substituted for the mandatory language of Opinion No. 378 the permissive language "opportunity be

(4713)

afforded for further filings" and "opportunity to make filings," in Opinion No. 378-A. In this fashion the Commission apparently believes that it can successfully escape its lack of legal power to require the execution of new contracts or "new arrangements." While the Commission purportedly makes it permissive, rather than mandatory, for revised filings to be made, it has at the same time declared that unless such "revised filings" are made "the parties would be in the position of being in violation of the Natural Gas Act." Thus, these modifications of Opinion No. 378, contained in Opinion No. 378-A, constitute an indirect, rather than a direct, means of attempting to force revised filings to be submitted and

4714

is as patently unlawful as the mandatory requirement of Opinion No. 378.

IX.

This application for rehearing is being filed out of an abundance of caution and to preclude any assertion by the Commission that Marr has not exhausted his administrative remedies. In so filing this application Marr is not waiving any of the contentions previously asserted in his applications for rehearing filed with the Commission on March 7, 1963 and April 15, 1963, but on the contrary reasserts such contentions and incorporates such applications herein by reference.

As a further precaution against any assertion that Marr has not availed himself of all legal remedies, Marr is filing concurrently herewith a supplement to his petition for review in the United States Court of Appeals for the Fifth Circuit in Docket No. 20560 to request review of the Commission's Opinion No. 378-A and accompanying order of July 12, 1963. By such supplemental petition Marr is not waiving his contention that the Respondent's Opinion No.

(4716)

378 and accompanying order of February 6, 1963 and the order of April 2, 1963 constitute final orders subject to review or any of his other contentions under the original petition for

4715

review filed on May 22, 1963 but on the contrary reasserts all of the contentions and allegations of error set forth therein.

WHEREFORE, for all of the foregoing reasons, Marr requests the Commission to grant this application for rehearing and to reverse and set aside its Opinion No. 378, its order of April 2, 1963 and its Opinion No. 378-A.

Respectfully submitted,

M. H. MARR

By STANLEY M. MORLEY
Attorney for Petitioner

Donley C. Wertz
2500 Republic National Bank Building
Dallas, Texas

May, Shannon and Morley
1700 K Street, N. W.
Washington 36, D. C.

Hargrove, Guyton and Van Hook
Texas Eastern Building
Shreveport, Louisiana
Attorneys for Petitioner

4716

DISTRICT OF COLUMBIA) ss:

Stanley M. Morley, being first duly sworn, deposes and says that he is an attorney for M. H. Marr; that as such he has signed the foregoing "Application For Rehearing by M. H. Marr" for and on behalf of said Company; that

(4716)

he is authorized so to do; that he has read said Application and is familiar with the contents thereof; and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

STANLEY M. MORLEY
Stanley M. Morley

Subscribed and sworn to before me, a Notary Public, this
29th day of July, 1963.

Thomas C. Evans
Notary Public

(SEAL)

My Commission expires September 14, 1965.

4717-4720

CERTIFICATE OF SERVICE

4721

BEFORE THE
FEDERAL POWER COMMISSION
UNITED STATES OF AMERICA

In the Matters of
Docket Nos. G-12446, G-12447
Texas Eastern Transmission Corporation

G-12432

Continental Oil Company

Application for Rehearing by General Crude Oil Company

Docketed July 31, 1963

4722

Comes now General Crude Oil Company ("General Crude") and, pursuant to the provisions of section 19(a) of the Natural Gas Act and Section 1.34 of the Commis-

sion's Rules of Practice and procedure, being aggrieved, hereby applies for rehearing of the Commission's Opinion No. 378-A in the above-entitled proceedings, issued on July 12, 1963 and of Opinion No. 378, issued February 6, 1963 as modified by the Commission's orders issued April 2, 1963 and May 1, 1963 and by Opinion No. 378-A. In support of this application for rehearing, General Crude states as follows:

I.

In Opinion No. 378-A, entitled "Opinion and Order on Rehearing" the Commission (Commissioner Woodward dissenting) has reiterated and reaffirmed the unlawful assumption of jurisdiction over the assignment and conveyance by General Crude of gas leaseholds located in the Rayne Field, Acadia

4723

Parish, Louisiana, to Louisiana Gas Corporation, an affiliate of Texas Eastern Transmission Corporation ("Texas Eastern"), which the Commission had previously asserted in Opinion No. 378 and in its order issued April 2, 1963. In reaffirming this erroneous finding and conclusion the Commission has, in Opinion No. 378-A, advanced additional legally untenable positions and argument in an attempt to justify its unlawful assertion of jurisdiction and General Crude therefore applies for rehearing of this latest Opinion and Order.

II.

In the first complete paragraph on page 2 of its Opinion No. 378-A the Commission states that it sees "no need to repeat" its discussions of the jurisdictional issue but then asserts that the "quick answer to the producers' additional argument that under the law of Louisiana there is no such thing as a sale of gas in place is that we are interpreting

and applying the Natural Gas Act, not state law." In this summary and superficial fashion the Commission attempts to deal with the valid legal objection which General Crude registered in its application for rehearing of Opinion No. 378, to the Commission's inaccurate, misleading and illegal characterization of this transaction as an "in-place sale of the Rayne Field gas to Texas Eastern." The Commission does not even attempt to dispute the fact, as stated in General Crude's

4724

application for rehearing, that under Louisiana law there is no legally recognizable sale of gas in place; that one may only own the land or the right to produce minerals therefrom or may own gas after severance by production; and that no one can own, or sell, gas in place in Louisiana. This invalid "in place" characterization by the Commission, as well as its equally invalid "in bulk" terminology employed in its Opinion No. 378, were obviously purposely used to convey the erroneous impression that the sale of gas leases involved was tantamount to a "wholesale" sale and thus within the Commission's jurisdiction. This distorted characterization and interpretation of the nature of the transaction is as invalid under the Natural Gas Act as it is under Louisiana law, and the Commission may not legally change its essential nature on the premise that it is "interpreting and applying the Natural Gas Act, not state law."

III.

In Opinion No. 378-A the Commission attempts to refute General Crude's claim of error because the Commission disregarded the determination and ruling of the Internal Revenue Service that the sales in the form described in the Lease Sale Agreement were of leasehold rights sub-

ject to tax treatment as capital gains rather than sales of gas subject to treatment as normal income. The Commission's citation

4725

of the case of *Colorado Interstate Gas Co. v. F.P.C.*, 209 F. 2d 717, 727, in an attempt to support its disregard of the ruling of the Internal Revenue Service is entirely misplaced as that case does not constitute a valid precedent for the Commission's action here. As the Court pointed out in that case, the Internal Revenue Service's action there involved was adopted "for another purpose and at another time" that is, it was "adopted six years before." On the contrary, in this case, the ruling of the Internal Revenue Service was obtained in connection with and was part and parcel of the same transaction. As a matter of fact, obtaining the ruling was a condition attached to the consummation of the transaction itself. The Commission's farther attempt to distinguish the case of *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, is equally invalid. In that case the Supreme Court, among other things, stated that there "is privity between officers of the same government" and that "the principles of res judicata apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties." These principles are applicable here.

IV.

In the last complete paragraph on page 2 of Opinion No. 378-A the Commission again makes a vain and

4726

futile effort to distinguish the Supreme Court's decision in *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, this time on the primary and apparently the sole

ground "that contrary to the situation in the *Panhandle* case the leases in this case were transferred to a pipeline which intended to transport the gas in interstate commerce." Again, in footnote 2 on page 3 of Opinion No. 378-A the Commission abandons its other unsuccessful attempts to distinguish the *Panhandle* case, previously attempted in Opinion No. 378 and states "However, the most important distinction between this case and *Panhandle* remains, for here the sale was made in order to supply the interstate market." The Commission's total disregard of the limitations upon its jurisdiction contained in the Natural Gas Act and its failure and refusal to recognize any such limitations is clearly evident from its language on page 2 of Opinion No. 378-A where it states:

"... The lease transfer transaction, however designated and under whatever provisions of local law, was a means by which the producers were paid for their gas by a pipeline which transported the gas and delivered it to buyers in other states."

Under the foregoing language, the Commission has asserted unlimited jurisdiction and authority over any means by which the owners of properties capable of producing gas are paid for the sale of such properties, provided only that the gas subsequently produced from such properties

4727

moves in interstate commerce. In the first place, the use of the term "producers" to describe the parties who sold and conveyed the leases to Texas Eastern in this transaction is incorrect and misleading. Texas Eastern alone was and is the "producer" of gas from the leases which were sold and conveyed to it by this transaction.

In the second place, the broad assertion of jurisdiction by the Commission is wholly illegal and disregards and repudiates the limitations upon its jurisdiction heretofore repeatedly recognized by the Commission itself and the the courts. In direct refutation of the Commission's attempt here to expand its jurisdiction beyond that conferred by the Natural Gas Act, and contrary to the Commission's futile effort to distinguish the *Panhandle* case on the ground that the gas to be produced from the leases there involved was to move intrastate instead of interstate, the Supreme Court's decision in the *Panhandle* case was predicated upon the absence of jurisdiction over gas leases because they are production facilities and the transfer of such gas leases involves a production activity over which the Commission has no jurisdiction. Specifically, the Supreme Court did not base its decision upon the circumstances that the gas involved in the *Panhandle* case was to move intrastate instead of interstate, and the Commission's attempt to distinguish the case on that ground is without any foundation whatsoever.

4728

In footnote 2, on pages 2 and 3 of Opinion No. 378-A the Commission retreats somewhat from several of its erroneous statements and conclusions in Opinion No. 378 which were pointed out in General Crude's previous applications for hearing. However, the Commission characterizes these corrections as not "material" or would not "change our view of the transaction." This attitude of the Commission serves to emphasize that it is determined to assert jurisdiction over this transaction, irrespective of any misunderstandings it may have had of the factual situation and that it has repeatedly shifted its grounds for asserting jurisdiction, all in defiance of previous Commission and Court precedent to the contrary.

V.

On pages 3 and 4 of Opinion No. 378-A the Commission attempts to avoid its own previous holding that it lacks jurisdiction in this case over the transfer of gas leases involved, and the affirmance of this lack of jurisdiction by the Court of Appeals for the District of Columbia Circuit, by misplaced reliance upon statements such as it "is a well-known principle that the question of jurisdiction, that is the competency of the administrative agency to act upon the subject matter, is always open for judicial determination." In support of this statement, the Commission cites *Borax*,

4729

Ltd. v. Los Angeles, 296 U.S. 10, 18. The misuse of this case for the purpose stated is apparent. On the page reference given by the Commission the Supreme Court did not use the language attributed to it, namely, that the question of jurisdiction "is always open for judicial determination." On the contrary, the Court stated "the principle that the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always *one* for judicial determination." Thus, in its paraphrase of the Court's language, the Commission has changed and distorted the entire meaning of the Court's language. As a matter of fact, this case supports our own contention here, that the jurisdictional issue was a matter for judicial determination and that judicial determination was previously made by the Court of Appeals for the District of Columbia Circuit.

The Commission's reliance upon *Davis, Administrative Law* (1958), § 18.07, is also misplaced. *Davis*, based upon a review of the authorities, states that to "say that a tribunal cannot confer power upon itself merely by making a finding that it has jurisdiction is entirely logical."

Moreover, Davis states, "But equally logical is the proposition that every tribunal has jurisdiction to determine its own jurisdiction and that if the parties have litigated the question of jurisdiction once, the policies against re-litigation are fully applicable."

4730

VI.

In Opinion No. 378-A the Commission continues to make the wholly unwarranted and inaccurate assertion that the jurisdictional question was not "in issue" and "received little attention" in the case of *Public Service Commission v. F.P.C.*, 287 F. 2d 143, 145, 146, in the District of Columbia Circuit involving review of the Commission's Opinion No. 322, in which the Commission itself held that it lacked jurisdiction. As we have previously pointed out, the Commission's brief in that court case is replete with references and arguments supporting its lack of jurisdiction. And the court itself stated unequivocally that "the Commission has been held to lack jurisdiction over gas leases," citing in support of this legal conclusion *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. At another point in its decision, the District of Columbia Circuit referred to the transactions as "beyond the regulatory control of the Commission."

It is incomprehensible to us how the Commission can now validly claim that the jurisdictional question was not "in issue" and "received little attention" in the prior court proceedings. The Commission's lack of jurisdiction over the gas leases involved was the fundamental premise upon which both the Commission and the Court acted and both

4731

the Commission and the Court relied upon the *Panhandle* case in reaching this conclusion. In sum and substance,

(4731)

the Commission now seeks to repudiate not only its own prior decisions but the decision of the District of Columbia Circuit as well. In this effort, the Commission has repeatedly resorted to the ineffectual and inaccurate device of accusing the Court of paying "little attention" to the jurisdictional question.

VII.

On pages 4 and 5 of Opinion No. 378-A the Commission attempts to meet our contention that it lacks legal power to require a "new arrangement," as provided for in Opinion No. 378, by now asserting, in Opinion No. 378-A, that "it is not necessary to discuss the extent of our power to reform contracts under the Natural Gas Act, for we did not attempt to do so here." The Commission now states that it "intended to give the parties further opportunity to obtain certificates in these proceedings for a sale of gas which they have consummated at least in part." Furthermore, the Commission now states:

"... Without such revised filings we would be constrained to deny certificates, and, in such case, the parties would be in the position of being in violation of the Natural Gas Act. We did not intend to order the parties to execute a particular kind of contract, or any contract, apart from the

4732

necessity of completing the present proceedings. In order to make our meaning clearer we shall revise our finding (7) and ordering clause (B) as shown below."

A comparison of finding (7) and ordering clause (B), as contained in Opinion No. 378, with the similar provisions in Opinion No. 378-A, shows that the Commission has purportedly substituted for the mandatory language of Opin-

ion No. 378 the permissive language "opportunity be afforded for further filings" and "opportunity to make filings," in Opinion No. 378-A. In this fashion the Commission apparently believes that it can successfully escape its lack of legal power to require the execution of new contracts or "new arrangements." While the Commission purportedly makes it permissive, rather than mandatory, for revised filings to be made, it has at the same time declared that unless such "revised filings" are made "the parties would be in the position of being in violation of the Natural Gas Act." Thus, these modifications of Opinion No. 378 contained in Opinion No. 378-A, constitute an indirect, rather than a direct, means of attempting to force revised filings to be submitted and are as patently unlawful as the mandatory requirement of Opinion No. 378.

VIII.

In its modified finding clause (7), as set forth on page 5 of its Opinion No. 378-A, the Commission erroneously

4733

purports to offer opportunity for "further filings on the part of Texas Eastern and its suppliers of gas." This finding and statement of the Commission is erroneous for the reason that it improperly refers to General Crude and to other sellers of leases as suppliers of gas, a term which in its normal and accepted understanding applies only to those engaged in the production and delivery of gas to another. General Crude and the other sellers having disposed of their gas leasehold interests and at no time being engaged in the production of such gas for delivery to Texas Eastern are not "suppliers of gas." Furthermore, such finding implies that General Crude and the other parties who sold gas leaseholds have "filings" of some sort presently before the Commission, contrary to fact.

(4733)

There are no "further filings" for General Crude to make because it has no present filings before the Commission.

IX.

The Commission is in error in its ordering clause (B) as set forth in Opinion No. 378-A, page 6, by inconsistently purporting to grant opportunity to make filings of appropriate rate schedules and applications for certificates of public convenience and necessity to General Crude and others characterized as "Rayne Field producers" while at the same time recognizing that they have transferred their gas

4734

leases. It is further evident that it is neither possible nor appropriate for parties without ownership of leases to file rate schedules or applications for certificates of public convenience and necessity with respect to any production or any sale of gas from leases which they do not own.

X.

On pages 4 and 5 of Opinion No. 378-A the Commission states that "Without such revised filings we would be constrained to deny certificates, and, in such case, the parties would be in the position of being in violation of the Natural Gas Act." This assertion that the parties would be in violation of the Natural Gas Act has not heretofore been mentioned in previous Commission orders and apparently has now been resorted to by the Commission as a means by which it seeks to compel or force the parties selling the gas leaseholds to Texas Eastern to make filings. The purpose of this requirement is apparent. The Commission has in effect threatened to invoke the penalty provisions of the Natural Gas Act as a sanction for non-compliance with its unlawful orders. This approach is

beyond any legal authority conferred upon the Commission by the Natural Gas Act. In refutation of this statement by the Commission, General Crude asserts that it has not violated the Natural Gas Act and cannot lawfully be subjected to any of the penalties prescribed by that Act.

4735

XI.

In Opinion No. 378-A the Commission has ordered that its Opinion No. 378 be confirmed except as modified by its orders issued April 2, 1963 and May 1, 1963 and by Opinion No. 378-A, and has modified or altered the language of finding clause (7) and ordering clause (B) of its Opinion No. 378. As a result of these generalized modifications or changes in its original Opinion No. 378, and by carrying forward the composite of four separate orders without clearly or definitely identifying the changed modifications of the earlier orders, the Commission has created a situation which renders its various orders vague, indefinite, uncertain and, in many respects, unintelligible and inconsistent, and its orders are accordingly invalid on this additional ground.

XII.

In view of the fact that the Commission, in Opinion No. 378-A, purports to confirm its previous Opinion No. 378 as modified by its further orders of April 2, 1963 and May 1, 1963 and has not, in its further Opinion No. 378-A, dealt with or attempted to meet many of the grounds of error which were asserted in General Crude's previous application for rehearing of Opinion No. 378, filed on March 6, 1963, and its application for rehearing of the Commission's order of April 2, 1963, filed

(4736)

4736

on April 22, 1963, these applications for rehearing are hereby incorporated by reference herein and made a part hereof.

WHEREFORE, for all of the foregoing reasons, General Crude requests the Commission to grant this application for rehearing and to reverse and set aside its Opinion No. 378, its orders of April 2, 1963 and May 1, 1963 and its Opinion No. 378-A.

Respectfully submitted,

GENERAL CRUDE OIL COMPANY

By W. M. STREETMAN

W. M. Streetman

Its Attorney

Leon M. Payne, Esq.

W. M. Streetman, Esq.

Andrews, Kurth, Campbell & Jones

25th Floor Humble Building

Houston 2, Texas

Attorneys for General Crude Oil Company

4737

THE STATE OF TEXAS

COUNTY OF HARRIS

W. M. Streetman, being first duly sworn, deposes and says that he is attorney for General Crude Oil Company; that as such he has signed the foregoing "Application for Rehearing by General Crude Oil Company" for and on behalf of said Company; that he is authorized so to do; that he has read said Application and is familiar with the contents thereof; and that the matters and things therein set

(4743)

forth are true and correct to the best of his knowledge, information and belief.

W. M. STREETMAN

W. M. Streetman

Subscribed and sworn to before me, a Notary Public, this 30th day of July, 1963.

FAE CROPPER

Fae Cropper

Notary Public in and for
Harris County, Texas

My Commission expires June 1, 1965.

(SEAL)

4738-4742

CERTIFICATE OF SERVICE

4743

Docketed Aug. 7, 1963

Docket Nos. G-12446, et al

TEXAS EASTERN TRANSMISSION COMPANY, ET AL

Stanley H. Morley, Attorney

May, Shannon and Morley

1700 K Street, N. W.

Washington 6, D. C.

Dear Mr. Morley:

The Application for Rehearing by M. H. Marr which you submitted in the above-entitled matter on July 29, 1963, is not acceptable because there is no provision under the Natural Gas Act nor in the Commission's Rules for rehearing of orders denying rehearing.

(4743)

Your application is therefore rejected and copies are returned herewith.

Very truly yours,

Secretary

Enclosure No: 9009
(12 copies application)
Dockets
Bewley, G: eac
cc: BNG
OGC
OPI
Secy (2)

4744

Docket Nos. G-12446, et al

TEXAS EASTERN TRANSMISSION CORPORATION, ET AL

Docketed Aug. 7, 1963

Robert E. May, Attorney
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Dear Mr. May:

The Application for Rehearing by Sun Oil Company which you submitted in the above-entitled matter on July 25, 1963, is not acceptable because there is no provision under the Natural Gas Act nor in the Commission's Rules for applications for rehearing of orders denying rehearing.

(4745)

Your application is therefore rejected and copies are returned herewith.

Very truly yours,

J. H. GUTRIDE
Secretary

Enclosure No. 9010
(12 copies application)
Dockets
Bewley, G: eac
cc: OGC
BNG
OPI
Secy (2)

4745

Docket Nos. G-12447, G-12446 and G-12432

TEXAS EASTERN TRANSMISSION CORPORATION

CONTINENTAL OIL COMPANY

Docketed Aug. 8, 1963

Mr. W. M. Streetman
Andrews, Kurth, Campbell & Jones
25th Floor Humble Building
Houston 2, Texas

Dear Mr. Streetman:

The Application for Rehearing by General Crude Oil Company which you submitted in the above-entitled matter on July 31, 1963, is not acceptable because there is no provision under the Natural Gas Act nor in the Commission's Rules for applications for rehearing of orders denying rehearing.

(4745)

Your application is therefor rejected and copies are returned herewith.

Very truly yours,

Secretary

Enclosure No: 9011

(19 copies of applications)

Dockets

GB: gfp

8/1/63

OGC

BNG

OPI

(2) SECY.

4671A

FEDERAL POWER COMMISSION
WASHINGTON 25

Texas Eastern Transmission Corporation

Docket Nos. G-12446 and G-12447

Continental Oil Company

Docket No. G-12432

May 14, 1963

Continental Oil Company

Lloyd F. Thanhouser, Esq.

Vice President and General Counsel

P. O. Box 2197

Houston 1, Texas

Gentlemen:

Reference is made to the "application for rehearing" tendered for filing on April 30, 1963, in the above-designated matters. The "application" is not addressed to a final order and as such is not acceptable for filing. It will be processed as a motion for reconsideration of the Com-

(4746)

mission's order issued April 2, 1963, and you will be advised of the Commission's action thereon.

The acceptance of the tendered "application for rehearing" as a motion for reconsideration should not be construed that the 30-day provision of Section 19 (b) of the Natural Gas Act as implemented by 1.34 (c) of the Commission's Rules of Practice and Procedure, will apply to the motion.

Very truly yours,

J. H. Gutride
Secretary

4746

August 9, 1963

Mr. J. H. Gutride, Secretary
Federal Power Commission
441 G Street, N. W.
Washington 25, D. C.

Re: Texas Eastern Transmission
Corporation, *et al.*
Dockets G-12,446, *et al.*

Dear Mr. Gutride:

Enclosed are the original and nineteen conformed copies of Continental's Application for Rehearing of Opinion No. 378-A, which I would appreciate your filing for us.

Very truly yours,

Tom Burton
Attorney

TB-HRN
Encs.

(4747)

4747

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

August 21, 1963

Docket Nos. G-12446, et al

TEXAS EASTERN TRANSMISSION CORPORATION, ET AL

Thomas H. Burton, Attorney
Continental Oil Company
Post Office Box 2197
Houston 1, Texas

Dear Mr. Burton:

The Conditional Application for Rehearing of Opinion No. 378-A, tendered for filing on behalf of Continental Oil Company on August 12, 1963, is not acceptable because there is no provision under the Natural Gas Act nor in the Commission's Rules for application for rehearing of orders denying rehearing.

Your application is therefore rejected and copies are returned herewith.

Very truly yours,

J. H. GUTRIE
Secretary

Enclosure No: 9015

[fol. 1277]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20560

M. H. MARR, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20564

SUN OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20582

CONTINENTAL OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20587

GENERAL CRUDE OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20829

SUN OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20846

M. H. MARR, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20847

GENERAL CRUDE OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20591

TEXAS EASTERN TRANSMISSION CORPORATION, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

Petitions for Review of Orders of the
Federal Power Commission

OPINION—August 3, 1964

[fol. 1279] Before Rives and Brown, Circuit Judges, and
Grooms, District Judge.

Rives, Circuit Judge: These are petitions to review
certain opinions and orders of the Federal Power Com-

mission pursuant to section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b). The petitioners are M. H. Marr, Sun Oil Company, Continental Oil Company, General Crude Oil Company, and Texas Eastern Transmission Corporation. Unless otherwise noted, all of the petitioners with the exception of Texas Eastern will be referred to herein as "the assignors." The intervenors are the Public Service Commission of the State of New York, the United Gas Improvement Company, and the Public Service Electric and Gas Company.

In 1957 Texas Eastern, a natural-gas company owning and operating an interstate natural-gas transmission system, executed gas purchase contracts with the assignors to purchase their natural-gas production in the Rayne Field, Acadia Parish, Louisiana, at an initial price of 23.9¢ per Mcf, including state taxes of 1.3¢ per Mcf.¹ At that time the assignors filed applications with the Federal Power Commission seeking certificates of public convenience and necessity for the gas sales, and Texas Eastern applied for a certificate to expand its interstate pipeline system in order to receive and re-sell the gas. These sales [fol. 1280] contracts, however, were cancelled in 1958 shortly after the Third Circuit decision in *Public Service Commission v. FPC*, 3 Cir. 1958, 257 F.2d 717, *aff'd sub nom. Atlantic Refining Co. v. PSC*, 1959, 360 U.S. 378 (popularly called GATCO), and the Commission permitted the assignors to withdraw their then pending certificate applications.

After the cancellation of the sales contracts, the assignors entered into agreements whereby they purported to assign or convey certain of their leasehold rights in the Rayne Field gas to Texas Eastern.² The Commission al-

¹ Although a large, developed gas reserve, the Rayne Field gas as yet was not connected with any pipeline transporting natural gas in interstate commerce nor was it dedicated to any sale in interstate commerce.

² The total purchase price was \$134,395,700.00. The purchaser was actually Louisiana Gas Corporation, a wholly-owned subsidiary of Texas Eastern, which in turn assigned its interest to Texas Eastern. Unless otherwise noted, Texas Eastern will be treated as the purchaser.

lowed Texas Eastern to amend its application so as to reflect the new agreements and in June 1959 unconditionally authorized the construction and operation of the proposed pipeline facilities. The opinion³ approved the project without examining into the cost to Texas Eastern of the leasehold interests and noted that the Commission had no authority to issue a certificate directly authorizing the acquisition of the leases. The Public Service Commission of New York sought review of this order, and in *Public Service Comm'n v. FPC*, D.C. Cir. 1961, 287 F.2d 143, it was reversed and remanded by the District of Columbia Circuit. The court observed:

"Sales of natural gas by an independent producer are subject to Commission regulation under Sections 4 and 5 of the Natural Gas Act. Phillips Petroleum Co. [fol. 1281] v. State of Wisconsin, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035. But the Commission has been held to lack jurisdiction over gas leases. Federal Power Commission v. Panhandle Eastern Pipe Line Co., 1949, 337 U.S. 498, 69 S.Ct. 1251, 93 L.Ed. 1499."

Nevertheless, the court held that the Commission did have jurisdiction over the pipeline construction project and the transactions by which Texas Eastern would dispose of the gas, for the Commission has a responsibility to regulate the purchaser, "regardless of the status of the seller."⁴ Taking into consideration the Supreme Court's decision in *CATCO, supra*, the court concluded that insofar as the Commission's order purported to pass favorably upon the pricing aspects of the gas lease acquisitions, it was unsupported by substantial evidence in the record. The court offered the Commission two options: (1) clarifying the order by disclaiming any approval of the purchase price, or (2) reopening the record to allow Texas Eastern to establish that the acquisition costs would be consistent with the public convenience and necessity. The Commis-

³ Texas Eastern Transmission Corp., Opinion No. 322, 21 F.P.C. 860 (1959).

⁴ 287 F.2d at 145.

⁵ *Id.* at 146.

sion's order was reversed, and the matter remanded to the Commission for further proceedings not inconsistent with the opinion of the court.

On remand, the Commission chose to reopen the record. In these proceedings Commission counsel argued for the [fol. 1282] first time that the Commission had jurisdiction over the acquisition of the leases. The Examiner, however, rejected this contention.⁶ Instead, he recommended

⁶ The Examiner's report stated:

"As far back as 1949, the Commission contended it had jurisdiction over the sale by Panhandle of certain leases and leasehold interests covering an estimated 12 per cent of the total gas reserves of Panhandle but the Supreme Court in *F.P.C. v. Panhandle Eastern Pipe Line Company, et al.*, 377 U.S. 498, recognized and upheld the traditional industry practice of a natural gas company to buy and/or sell leases and leasehold interests which are 'not connected with any pipeline system' (emphasis supplied) without the approval of the Commission. From this, it would appear, one of the prerequisites to Commission jurisdiction is that the natural gas under the leases or leasehold interests must first be connected to a pipeline system transporting natural gas in interstate commerce. The Commission argued before the D.C. Circuit, in the following case, it did not have jurisdiction over Texas Eastern's acquisition of the Rayne Field leases and leasehold interests and, in its opinion, the Court of Appeals, *D.C. Circuit, in Public Service Commission of the State of New York v. F.P.C.*, 287 F.2d 143, 145 said '... the Commission has been held to lack jurisdiction over gas leases' citing *F.P.C. v. Panhandle, supra*. It is contended in the briefs filed herein the Supreme Court reversed its decision in the *Panhandle* case, *supra*, by its decision in *Phillips Petroleum Co. v. Wisconsin, et al.*, 1954, 347 U.S. 672. Quite to the contrary. In *Phillips* the Supreme Court recognized and reaffirmed the Panhandle prerequisite of the gas being attached to an interstate system of pipelines before the Commission acquired jurisdiction. . . .

"... [T]he natural gas under consideration by the Supreme Court in its *Phillips* opinion, *supra*, had previously been attached to, or connected with, an interstate system of pipelines and, because of this connection, the gas flowed in interstate commerce and thereby became subject to the jurisdiction of the Commission.

"In applying the principles of the *Panhandle* and *Phillips* opinions, *supra*, to the evidence of record in this hearing, it is concluded the Commission was without jurisdiction over the Rayne Field lease and leasehold acquisition and the

that Texas Eastern be issued a certificate of public convenience and necessity conditioned on its charging an initial, "in line" price of 18.5¢ per Mcf, exclusive of taxes, at 15.025 [fol. 1283] psia, and further conditioned on its maintaining supplemental accounts providing cost data.

Exceptions were filed, and in February 1963 the Commission issued Opinion No. 378, wherein it asserted jurisdiction over the lease transaction.⁷ Looking to the "essence" of the transaction, the Commission concluded that it was a transfer of natural gas for resale in the interstate market and that such a transfer is subject to the Commission's jurisdiction even when it occurs during the course of production and gathering. The Commission declined to inquire into the cost data and delayed passing on Texas Eastern's certificate; instead, it commanded the assignors to file appropriate rate schedules and applications for certificates for the sale of the gas, to be effective retroactively. The assignors were allowed to file applications for rehearing, but on rehearing the Commission, with one Commissioner dissenting, reaffirmed its previous holding and noted that the failure of the assignors to file for certificates would result in their violating the act. The petitioners are seeking review of these opinions and the orders related [fol. 1284] thereto.⁸ The principal question to be decided is

natural gas under said leases and leaseholds by Texas Eastern until (1) the gas was connected to an interstate system of pipelines or (2) the gas was dedicated to a sale in interstate commerce."

⁷ Texas Eastern Transmission Corp., Opinion No. 378, 29 F.P.C. 249 (1963).

⁸ The petitions which were filed in this Court for review of Opinion No. 378 (Nos. 20,560; 20,564; 20,582; 20,587 and 20,591) were filed while the applications for rehearing were still pending. After the opinion on rehearing was rendered, Marr, Sun and General Crude filed new petitions (Nos. 20,829; 20,846 and 20,847) seeking review of both opinions, thus avoiding any jurisdictional problems. Continental and Texas Eastern, however, merely filed supplements to their petitions so as to include therein the opinion on rehearing. We conclude that this was sufficient to give this Court jurisdiction under 15 U.S.C. § 717r(b).

whether the Commission has jurisdiction over these lease transactions.

Significant to the disposition of the instant case is the Supreme Court decision in *FPC v. Panhandle Eastern Pipe Line Co.*, 1949, 337 U.S. 498. Panhandle Eastern, the owner of a pipeline system transporting natural gas in interstate commerce, transferred gas leases to a subsidiary, Hugoton. In return, Panhandle received all the outstanding stock of Hugoton and after a certain period an option to purchase all of the gas produced from the land. At the time of the transfer the land was undeveloped⁹ and not connected with any pipeline system. Hugoton thereafter contracted to sell that gas produced prior to the effective date of the option to a non-jurisdictional intrastate seller of natural gas. The gas leases transferred accounted for 12% of the gas reserves relied upon by Panhandle as the supply necessary to perform the services previously authorized by the Commission.

The Supreme Court held that the Commission did not have jurisdiction over the transfers of the leases. The Court based its decision on section 1(b) of the Natural Gas Act, which exempts "the production or gathering of natural gas" from Commission jurisdiction.¹⁰ It concluded [fol. 1285] that this phrase includes "the producing properties and gathering facilities of a natural-gas company"¹¹ and "incidents connected with the production or gathering of gas."¹² The Court found that "of course leases are

⁹ See 337 U.S. at 500, 519.

¹⁰ The Natural Gas Act §1(b), 15 U.S.C. §717(b), states:

"(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

¹¹ 337 U.S. at 505.

¹² *Id.* at 506.

an essential part of production."¹³ Thus it concluded that since "the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, the authority of the Commission cannot reach the sales."¹⁴

The Court was not persuaded by arguments that the gas leases had been dedicated to the discharge of Panhandle's public-utility obligation "to render adequate service at reasonable and nondiscriminatory rates:

"To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. [fol. 1286] This probably occurred because the state legislatures, in the interests of conservation, had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other. Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views."¹⁵

¹³ *Id.* at 505.

¹⁴ *Id.* at 515.

¹⁵ *Id.* at 509-13 (footnotes omitted).

It was noted that for over ten years the Commission had not claimed the right to regulate dealings in gas acreage. The Court concluded, "If the Commission is of the opinion that it should have power to control the disposition of leases by natural gas companies, it is authorized to call the attention of Congress to that fact." It is significant that annually for the past twelve years the Commission has unsuccessfully asked Congress to grant it jurisdiction over the transfer of leaseholds by natural gas companies.¹⁷

The Commission first argues that the "Lease Sale" transaction was in essence a sale of gas and thus does not come [fol. 1287] within the *Panhandle* decision. The Commission reasons that an ordinary oil and gas lease passes operating rights plus rights to the oil, gas, gas condensates, and other minerals. Using a mathematical analogy, it concludes that a "lease" which does not pass operating rights or rights to oil, gas condensates, or other minerals is merely a sale of gas. The Commission relies on five features of these contracts to show that they are in reality sales of gas: (1) the leases assigned gas rights only, and then only above a particular strata; (2) the assignors retained a production payment on natural gas (plant) liquids and separator liquids; (3) the notes for the deferred balance of payments could be accelerated by production in excess of a stated amount over each installment period; (4) Continental (only) operates all of the assigned properties by contract from Texas Eastern on a cost-plus fee basis, with costs recoverable out of the separator liquid proceeds before the production payment is determined; (5) Texas Eastern took the properties from its subsidiary, Louisiana Gas,¹⁸ subject to the debt, but is not personally liable thereon.

We disagree with the Commission's interpretation of the transaction. The "Assignment and Conveyance" not only passed rights to the gas, but also passed rights to wells and related production equipment and rights of

¹⁶ *Id.* at 515-16.

¹⁷ See Texas Eastern Transmission Corp., Opinion No. 378-A, 30 F.P.C. —, n. 1 (1963) (dissenting opinion).

¹⁸ See note 2, *supra*.

ingress and egress. The assignors retained no operating rights. Although Texas Eastern entered into a management agreement with Continental, this agreement did not change the essential nature of the transaction. The man-[fol. 1288] agement agreement stated that the reason for its execution was Continental's experience in operating and managing gas properties in or near Rayne Field, which has an extremely high pressure in its reservoirs. The agreement provided that, "Gathering, handling, separating, treating and storing of the production, the sale thereof and payment therefor shall not be included in this delegation of authority, such operating rights and duties to be performed by Louisiana Gas [Texas Eastern], its successors and assigns." The agreement further retained in Texas Eastern the right to decide whether and where wells would be drilled or deepened, whether secondary recovery or recycling operations would be conducted, and what volume of gas would be nominated for production each month.

We are concerned here only with whether these transfers were "leases" as that term was used in *Panhandle*. Since *Panhandle* held that "leases" relate to the production or gathering of natural gas and are thus outside Commission jurisdiction, it is clear that any "lease" transfer passing substantial rights which are related to production and gathering, as do the "leases" in the instant case, would likewise be outside Commission jurisdiction. We see no significance in the fact that the leases pertained only to gas and were limited to gas found above a certain depth.¹⁹ Nor do we see anything unusual about the reservation of a [fol. 1289] production payment out of the proceeds from sales of natural gas liquids.²⁰ The provision for accelerated payment of the purchase-money notes in case of increased production was merely a method of protecting the assignor's collateral security; there were no provisions for decelerated payments in case of decreased production. As

¹⁹ Cf. 3 Summers, *Oil & Gas* 603, 614 (Perm. ed. 1958); 2 Williams & Meyers, *Oil & Gas* 269; Merrill, *The Oil and Gas Lease—Major Problems*, 4 Neb.L.Rev. 488, 528, 531 (1962).

²⁰ Cf. Bryan, *Overriding Royalty Under Oil, Gas and Mineral Leases in Louisiana*, 29 Tul.L.Rev. 340 (1954).

already noted, the Management Agreement retained a number of controls in Texas Eastern. Such agreements are not an uncommon practice.²¹

The Commission argues that in light of *Phillips Petroleum Co. v. Wisconsin*, 1954, 347 U.S. 672, the *Panhandle* case is not a bar to jurisdiction in the instant case. *Phillips* held that sales of gas by producers in interstate commerce for resale are within the Commission's jurisdiction. It is contended here that, since Texas Eastern intended at the time of the transfer of the leases to send the gas produced therefrom into interstate commerce for resale, the transfer is a jurisdictional one.

The *Panhandle* case, however, held that transfers of gas leases are exempt as an activity related to production and gathering. The Court in *Phillips* expressly recognized this holding,²² but was there able to find jurisdiction because "production and gathering, in the sense that those terms are used in §1(b), end before the sales by *Phillips* occur."²³ This Court found jurisdiction for sales at well head in *Continental Oil Co. v. FPC*, 5 Cir. 1959, 266 F.2d [fol. 1290] 208, cert. denied, 361 U.S. 827 (1959), on the basis that such sales involved facilities for the sale of gas rather than facilities of production.²⁴ We recognized this distinction in *Deep South Oil Co. v. FPC*, 5 Cir. 1957, 247 F.2d 882, 889, cert. denied, 355 U.S. 930 (1958):

"The exemption of production and gathering merely means that the *physical activities, facilities and properties* used by petitioner in the production and gathering of natural gas are not within the commission's power of regulation. However, there is nothing in the

²¹ See 3 Summers, Oil & Gas 708 (Perm. ed. 1958).

²² 347 U.S. at 678.

²³ *Ibid.*

²⁴ *Accord*, *J. M. Huber Corp. v. FPC*, 3 Cir. 1956, 236 F.2d 550, 556, cert. denied, 352 U.S. 971 (1957), which distinguished *Panhandle* as involving the sale of gas leaseholds. *But cf.* *Saturn Oil & Gas Co. v. FPC*, 10 Cir. 1957, 250 F.2d 61, 68, cert. denied, 355 U.S. 956 (1958).

Act which suggests, either expressly or by implication, that by the exemption of production and gathering, Congress intended that the wholesale sales of natural gas in interstate commerce which are consummated before the gas has been gathered or processed should not be regarded as sales in such commerce over which the Commission was granted exclusive jurisdiction to regulate." (Emphasis added.)

We are bound by *Panhandle's* classification of leaseholds as being part of the "physical activities, facilities and properties" used in production and gathering. Sales at or near well head, however, are another matter. As stated in *FPC v. J. M. Huber Corp.*, D. N.J. 1955, 133 F.Supp. 479, 484, *aff'd*, 236 F.2d 550 (3 Cir. 1956), *cert. denied*, 352 U.S. 971 (1957):

[fol. 1291] "To say that the Commission has no authority over the real property interests a natural gas company acquires or relinquishes has little relevancy to a decision on jurisdiction over a sale at a point where production and gathering have ceased. In this case Huber has not attempted to sell or dispose of its interest in its gas wells, but rather seeks to terminate the flow of the product of the wells—the gas."

Thus, we conclude that the lease transactions in the instant cases are outside the Commission's jurisdiction. The Commission complains that this will leave a "gap" in its regulatory powers. Fifteen years ago the Supreme Court in *Panhandle* authorized the Commission to bring this to the attention of Congress,²⁵ and the Commission has repeatedly done so. If in its wisdom Congress has declined to act, we have neither the power nor the inclination to act in its stead.

Our decision as to jurisdiction makes unnecessary any determination of such questions as whether the D.C. Circuit opinion was binding on the Commission as "the law of the case." As to Texas Eastern's application, we are of

²⁵ 337 U.S. at 515-16.

the opinion that it should be remanded to the Commission to determine whether the public convenience and necessity require that the certificate be denied, granted, or granted conditionally, in view of the cost of acquisition. We note with regret that this is essentially what the D.C. Circuit told the Commission to do three and one-half years ago.

[fol. 1292] The orders are reversed and remanded for further proceedings not inconsistent with the opinion of this Court.

Reversed and Remanded.

[fol. 1293]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20560

M. H. MARR, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20564

SUN OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20582

CONTINENTAL OIL COMPANY, Petitioner,

versus

FEDERAL POWER COMMISSION, Respondent.

No. 20587

GENERAL CRUDE OIL COMPANY, Petitioner,
versus
FEDERAL POWER COMMISSION, Respondent.

[fol. 1294]

No. 20829

SUN OIL COMPANY, Petitioner,
versus
FEDERAL POWER COMMISSION, Respondent.

No. 20846

M. H. MARR, Petitioner,
versus
FEDERAL POWER COMMISSION, Respondent.

No. 20847

GENERAL CRUDE OIL COMPANY, Petitioner,
versus
FEDERAL POWER COMMISSION, Respondent.

No. 20591

TEXAS EASTERN TRANSMISSION CORPORATION, Petitioner,
versus
FEDERAL POWER COMMISSION, Respondent.

[fol. 1295]

On Petitions for Review of Orders of the
Federal Power Commission

Before Rives and Brown, Circuit Judges, and Grooms,
District Judge.

JUDGMENT—August 3, 1964

This cause came to be heard on the petitions of the M. H. Marr, Sun Oil Company, Continental Oil Company, General Crude Oil Company, and Texas Eastern Transmission Corporation, for review of Orders of the Federal Power Commission issued on February 6, 1963, April 12, 1963, and July 12, 1963, in Docket Nos. G-12446, et al., and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in these causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for further proceedings not inconsistent with the opinion of this Court.

Issued. as Mandate:

[fol. 1296]

SUPREME COURT OF THE UNITED STATES

No.—October Term, 1964

FEDERAL POWER COMMISSION, Petitioner,

VS.

M. H. MARR, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—November 2, 1964

Upon Consideration of the application of counsel for
petitioner.

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including November 16th, 1964.

Hugo S. Black, Associate Justice of the Supreme Court of the United States.

Dated this 2nd day of November, 1964.

[fol. 1297]

SUPREME COURT OF THE UNITED STATES

No. 644—October Term, 1964

THE UNITED GAS IMPROVEMENT COMPANY, Petitioner,

vs.

CONTINENTAL OIL COMPANY, ET AL.

ORDER ALLOWING CERTIORARI—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 693 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1298]

SUPREME COURT OF THE UNITED STATES

No. 693—October Term, 1964

FEDERAL POWER COMMISSION, Petitioner,

VS.

M. H. MARR, ET AL.

ORDER ALLOWING CERTIORARI—January 18, 1965.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 644 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.